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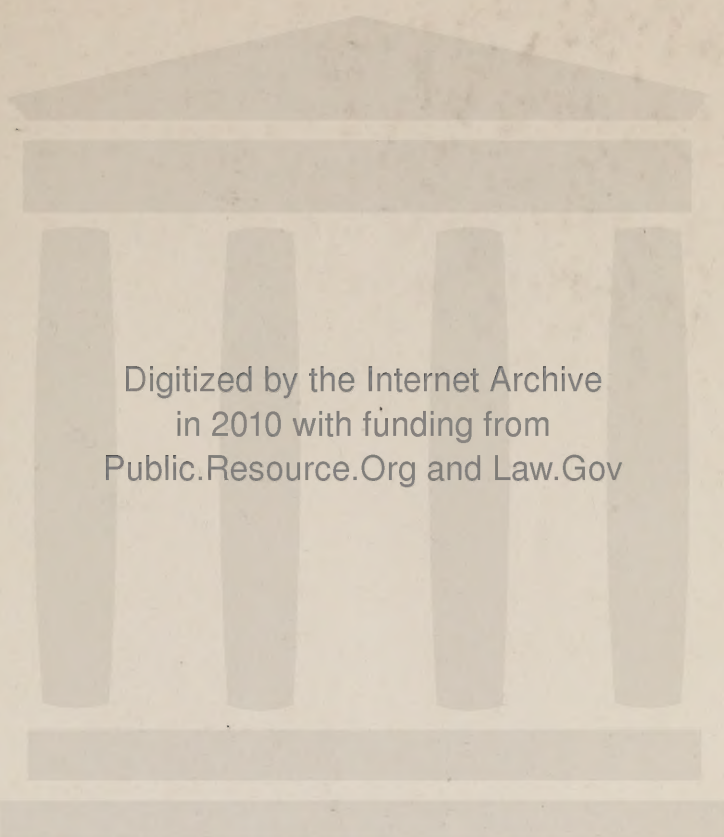
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30
NO. 2520.

United States
Circuit Court of Appeals
For the Ninth Circuit

HILL COUNTY,

Plaintiff in Error,

vs.

SHAW AND BORDEN COMPANY, a Corporation,
Defendant in Error.

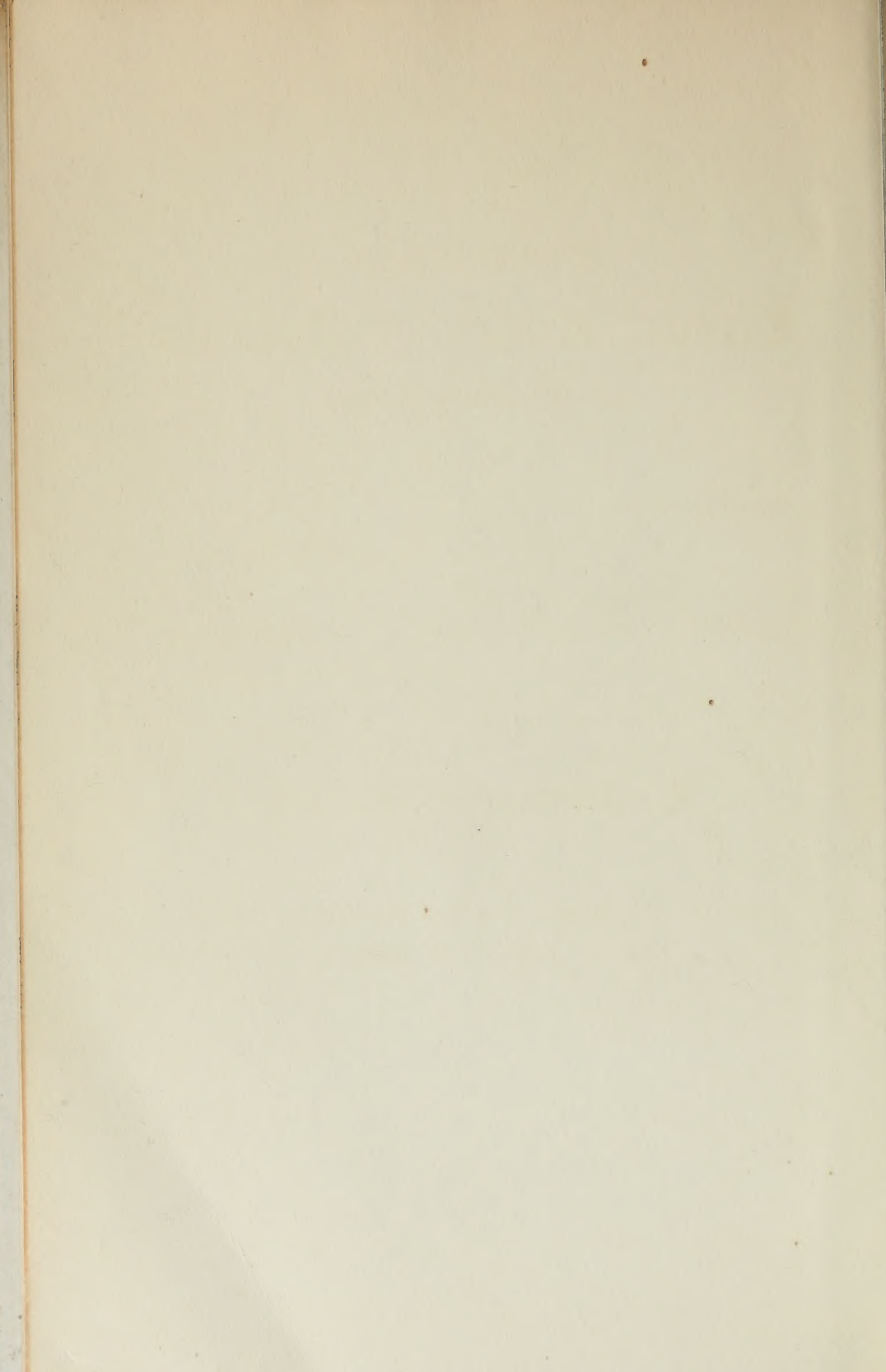
Transcript of Record

Error to the District Court of the United States
for the District of Montana

Filed

DEC 11 1914

F. D. Monckton,
Clerk



United States
Circuit Court of Appeals
For the Ninth Circuit

HILL COUNTY,

Plaintiff in Error,

vs.

SHAW AND BORDEN COMPANY, a Corporation,
Defendant in Error.

Transcript of Record

Error to the District Court of the United States
for the District of Montana

United States

Circuit Court of Appeals

for the Fifth Circuit

WILL COUNTY,

Washington, D.C.

vs

SHAW AND ROBERT COMPANY, a corporation,

Defendant in Error.

Transcript of Record

Filed to the District Court of the United States

for the District of Montana

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

C. A. SPAULDING, Helena, Montana, and

VICTOR R. GRIGGS, Havre, Montana,

Attorneys for Plaintiff in Error.

Messrs. GUNN, RASCH & HALL, Helena, Montana,

Attorneys for Defendant in Error.

*In the District Court of the United States in and
For the District of Montana.*

No. 367.

SHAW AND BORDEN COMPANY, a corporation,
Plaintiff,

vs.

HILL COUNTY,

Defendant.

BE IT REMEMBERED that on the 13th day of
December, 1913, the plaintiff filed its complaint
herein in the words and figures following, to-wit:

*In the District Court of the United States, District
of Montana.*

SHAW AND BORDEN COMPANY, a corporation,
Plaintiff,

vs.

HILL COUNTY,

Defendant.

COMPLAINT.

The plaintiff complains of defendant and for cause of action alleges:

I.

That it is now and was at all the times herein mentioned a corporation organized and existing under and by virtue of the laws of the State of Washington and a citizen of said state.

II.

That the defendant is now and was at all the times herein mentioned a county created, organized and existing under and by virtue of the laws of the State of Montana and a citizen of said state.

III.

That the amount in controversy in this action, exclusive of interest and costs, exceeds the sum of \$3000.00.

IV.

That on or about the 3rd day of March, 1912, the said defendant made and entered into a contract in writing with one B. B. Weldy, proprietor and publisher of a newspaper which had been published in said county for more than six months prior thereto wherein and whereby said Weldy agreed to do certain printing for said county and to sell, furnish and deliver to said county the books and other property described in exhibit "A" hereto attached and made a part hereof.

V.

That thereafter this plaintiff agreed with said Weldy to sell, furnish and deliver to said county

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.
Messrs. GUNN, RASCH & HALL, Helena, Montana,
Attorneys for Plaintiff in Error.

C. A. SPAULDING, Helena, Montana, and
VICTOR R. GRIGGS, Havre, Montana.
Attorneys for Defendant in Error.

*In the District Court of the United States in and
for the District of Montana.*

No. 367.

SHAW AND BORDEN COMPANY, a corporation,
Plaintiff,

vs.

HILL COUNTY,

Defendant.

BE IT REMEMBERED that on the 13th day of
December, 1913, the plaintiff filed its complaint
herein in the words and figures following, to-wit:

*In the District Court of the United States, District
of Montana.*

SHAW AND BORDEN COMPANY, a corporation,
Plaintiff,

vs.

HILL COUNTY,

Defendant.

COMPLAINT.

The plaintiff complains of defendant and for cause of action alleges:

I.

That it is now and was at all the times herein mentioned a corporation organized and existing under and by virtue of the laws of the State of Washington and a citizen of said state.

II.

That the defendant is now and was at all the times herein mentioned a county created, organized and existing under and by virtue of the laws of the State of Montana and a citizen of said state.

III.

That the amount in controversy in this action, exclusive of interest and costs, exceeds the sum of \$3000.00.

IV.

That on or about the 3rd day of March, 1912, the said defendant made and entered into a contract in writing with one B. B. Weldy, proprietor and publisher of a newspaper which had been published in said county for more than six months prior thereto wherein and whereby said Weldy agreed to do certain printing for said county and to sell, furnish and deliver to said county the books and other property described in exhibit "A" hereto attached and made a part hereof.

V.

That thereafter this plaintiff agreed with said Weldy to sell, furnish and deliver to said county

the books and other property described in said exhibit "A" and thereupon this plaintiff did furnish and deliver to said county all of the books and other property so described in said exhibit "A".

VI.

That this plaintiff has never owned nor published a newspaper and has never owned nor operated a printing establishment in the state of Montana, by reason of which the said defendant asserts and claims that the said Weldy was prohibited by section 2897 of the Revised Codes from subletting his said contract with said county, or any portion thereof to this plaintiff and from contracting and agreeing with this plaintiff to furnish and deliver the said books and other property so described in exhibit "A" to said county and denies any liability or obligation to pay this plaintiff or said Weldy for said books or other property or any part thereof and has refused and still refuses to pay any amount whatsoever therefor.

VII.

That said defendant has since the 8th day of March, 1912, converted said books and other property and the whole thereof to its own use to the damage of this plaintiff in the sum of \$4348.80, the reasonable value of said property.

VIII.

That at the time of such conversion this plaintiff was the owner and entitled to the possession of said property and the whole thereof.

IX.

That prior to the commencement of this action this plaintiff demanded of said defendant a return of said property, or payment of the value thereof, to-wit, the sum of \$4348.80, and presented to said defendant an account or claim for the said value of said property, made out in separate items, and in which the nature of each item, as shown by exhibit "A" hereto attached, was stated and in which the value of each of said items was also stated, which said account or claim was verified by the affidavit of an officer of this plaintiff, to-wit, its treasurer, showing that the said account or claim is just and wholly unpaid; that said claim was presented within one year after the last item therein accrued.

X.

That the board of county commissioners of said county has rejected and disallowed said claim, and refused said demand so made as aforesaid.

WHEREFORE, plaintiff demands judgment against said defendant for the said sum of \$4348.80, besides interest thereon and costs of this action.

GUNN, RASCH & HALL,

Attorneys for Plaintiff.

STATE OF MONTANA,

County of Lewis and Clark.—ss.

M. S. Gunn, being first duly sworn, deposes and says: That he is one of the attorneys for the plaintiff in the above entitled action; that he has read said complaint and knows the contents

thereof, and that the same is true to the best of his knowledge, information and belief; that the reason he makes this verification is because there is no officer of the said plaintiff now within the county of Lewis and Clark, wherein affiant resides.

M. S. GUNN,

Subscribed and sworn to before me this 13th day of December, 1913.

(Notarial Seal).

W. W. PATTERSON,

Notary Public for the State of Montana,
Residing at Helena, Montana.

My Commission expires May 6, 1914.

EXHIBIT "A".

- 131892 3 M. L. L. McMillan Ledger Sheets, 11½x 18.
- 131931 1—6 Qr. L. L. Transcribed Index to Liens (1 Printed Head) with Index 14x17.
- 131932 1—6 Qr. L. L. Transcribed Index to Attachments and Writs of Execution with Index (1 Printed Head) 14x17".
- 131933 1—8 Qr. L. L. Transcribed Index to Water Rights, Estrays and Lost Property 2 Separate Forms with Printed Heads and 2 Indexes 14x17.
- 131934 1—6 Qr. Transcribed Index to Official Bonds, Wills and Power of Attorney (3 Separate Single Printed Heads) 14x 17.
- 131935 1—6 Qr. Transcribed Index to Quartz, Placer and Annual Work Done on

Mining Claims (6 Printed Heads) 14x
17.

131936 1—8 Qr. L. L. Transcribed Index to Mort-
gages Real Property—direct (2 Printed
Heads) with Index.

1—8 Qr. Ditto Inverse—11½x18.

131937 1—8 Qr. L. L. Transcribed Index to Deeds
—Grantor.

1—8 Qr. L. L. Transcribed Index to
Deeds—Grantee.

With Index (2 Printed Heads Each)
11½x18.

131938 1—8 Qr. Transcribed Misc. Index Direct
with Index.

1—8 Qr. Transcribed Misc. Index In-
verse with Index.

(2 Printed Heads Each) 11½x18.

131939 1—6 Qr. Transcribed Index to Assign-
ments for Benefit of Creditors & Sep-
arate Property of Married Women
with Indexes (2 Separate Double
Heads) 14x17.

131940 1— — Qr. L. L. Transcribed Index to As-
signments of Mortgages & Leases with
Index.

(2 Separate Double Printed Heads) Di-
rect & Reverse, 14x17.

131941 1—6 Qr. L. L. Transcribed Index to
Transcript of Judgments. Notices of
Action & Cert. of Sales with Indexes.
3 Separate Single Printed Heads) 14x
17.

- 131942 1—6 Qr. L. L. Transcribed Road Record
Interleaved with Tracing Cloth. $11\frac{1}{2}$
x18".
- 131943 1—6 Qr. L. L. Transcribed Index to Mort-
gages — Personal Property — Direct
with Index.
1—6 Qr. Ditto Inverse (2 Separate
Double Heads Printed) $11\frac{1}{2}$ x18.
- 131944 1—6 Qr. L. L. Transcribed General Index
to Court Records—Direct, with (2
Printed Heads).
1—6 Qr. Ditto—Inverse $11\frac{1}{2}$ x18.
- 131945 1—8 Qr. Transcribed Judgment Docket
with Index (2 Printed Heads) $11\frac{1}{2}$ x18.
- 131946 1—6 Qr. L. L. Probate Register with In-
dex (1 Printed Head) $11\frac{1}{2}$ x18.
- 131947 1—8 Qr. L. L. Transcribed Marriage Rec-
ord (1 Printed Page) $11\frac{1}{2}$ x18.
- 131948 1—6 Qr. L. L. Transcribed Index to Mar-
riages $11\frac{1}{2}$ x18.
- 132659 1—6 Qr. L. L. Transcribed Index to Arti-
cles of Incorporation with Indexes—
 $11\frac{1}{2}$ x18.
3—Only 1" Smiths Adj. Index Tabs
Specially Printed HNB, SSB, CNB.
1—#338— $\frac{3}{4}$ " Majestic Current Binder,
Lettered.
1—#358 S Majestic Transfer Binder, Let-
tered.
- 132128 1—640 PP. L. L. Unfinished Business
Register Sheets (1 Printed Head) 14x
17.

- 8 *Shaw and Borden Co., a Corporation,*
- 132129 1—480 PP. Treasurer's Register of Bonds
 (2 Printed Pages).
- 132042 1 Treas. Register of Taxes Collected.
 80 Short Leaves Inserted Between the
 Long Leaves, Short Leaves $17\frac{1}{2} \times 16$.
- 131949 300 L. L. Warrant Register Sheets (2 Sets
 Index Sheets—Leather Tabs—5 to set
 $16\frac{3}{4} \times 13\frac{3}{4}$).
- 131950 40 School Clerk's Registers—2 Qr. Each
 $10\frac{1}{2} \times 16$.
 1—640 Page McMillan Record of Studies
 Completed 1 Alphabetical Index A to Z.
- 136157 1—6 Qr. L. L. Transcribed Index to Re-
 lease of Mortgages—with Indexes 2
 Pages Printed 14×17 .
- 134532 2 McMillan Binders L. L. 8 Quire.
- 134533 1 McMillan Binder L. L.
- 134534 2 McMillan Binders 8 Quire.
- 134491 50—Index Stays for Medium Books.
 6795 1 Single Hinge Sheet Holder $11\frac{1}{2}$ " Springs
 Full Canvas, Lettered 17×26 # 21481-D.
- 134535 1—50 Folio Special Improvement Assess-
 ment Roll.
- 135047 3—8 Qr. McMillan Binders for Commis-
 sioner's Proceedings.
- 135354 1—6 Qr. McMillan Binder.
 1 Roll #135—42" Imperial Tracing Cloth.
- 133048 3 M. L. L. McMillan Ledger Sheets.
 3 M. " " " "
- 133123 1—6 Qr. L. L. Transcribed Index to Re-
 lease of Mortgages with Indexes.

2 Printed Pages, Direct & Inverse 11½x18.

133709 500 L. L. McMillan Ledger Sheets 11½x18.

133043 4—8 Qr. McMillan Binder—Transcribed Deed Records.

3—8 Qr. McMillan Binder—Transcribed Mortgage Records.

2—8 Qr. McMillan Binder—Transcribed Patents.

2—8 Qr. McMillan Binder—Transcribed Water Rights.

2—8 Qr. McMillan Binder—Transcribed Miscellaneous.

One 6 Qr. McMillan Tax Sale Record 22x17¾.

134369 1 Set A to Z Alphabetical Tabs & Stays.

130596 1—6 Qr. Register of Prisoners 10½x16.

130597 1—4 Qr. Sheriff's Fee Book 16x21.

130598 1—6 Qr. Sheriff's Report of Boarders 14x17.

130599 100 Sheets Sheriff's Report of Boarders Ptd. Two Sides.

½ Dozen Pocket Day Books.

130591 1—2 Qr. Military Roll 7x9.

130592 1—6 Qr. McMillan Index to Plat Books Lots 14x17.

130593 1—6 Qr. McMillan L. L. Index Plat Books, Lands.

130594 1—6 Qr. Record of Final Proofs 10½x16.

130595 700 L. L. Sheets.

48 Index Tabs Special.

10 *Shaw and Borden Co., a Corporation,*

- 2 Russia & Canvas Sectional Post Binders.
130650 1500 Land Book Sheets—5 Different Ptd.
Sheets.
2 Russia & Canvas Sectional Post Binders.
130587 1—6 Qr. Plain General Record 10½x16.
130588 1—6 Qr. Plain Teachers Record 10½x16.
130489 1—6 Qr. Plain Trustees Record 10½x16.
130649 300 Plain L. L. Sheets.
1 Russia & Cord. Sectional Post Binder.
130600 500 Rules & Ptd. Pg. Township Sheets.
130524 1—4 Qr. General Ledger Index in Front
11½x18.
130525 1—4 Qr. Register of Bonds 10½x16.
130526 1 Treasurer's Petty Cash Book 14x17.
130527 1—4 Qr. Register of Vouchers Surrend-
ered.
130528 1—4 Qr. Treasurer's Monthly Balance
10½x16.
130529 1—4 Qr. Licenses Collected 14x17
130530 1—4 Qr. License Register 10½x16.
130531 1—4 Qr. Monthly Balance District School
Fund.
130532 1—6 Qr. Petty Ledger School District 10½
x16.
130533 1—6 Qr. Petty Ledger, Acct. with Banks
10½x16.
130534 1—6 Qr. Treasurer's Memoranda 10½x16
130535 1—2 Qr. Treasurer's Tax Sale Record.
130536 1—2 Qr. Register of Taxes Collected 27x
17.
130537 1—2 Qr. Treasurer's Cash Book 28x17.
130538 1 Delinquent Tax List 2 Qr. 28x17.

- 130539 200 Treasurer's Monthly Reports Ptd 2
Sides 10 $\frac{1}{2}$ x16.
- 130540 100 Treasurer's Quarterly Reports Ptd
Two Sides.
1—2 Qr. Index to Delinquent Tax Record.
- 130560 1—8 Qr. Plain Probate Record 11 $\frac{1}{2}$ x18.
- 130561 1—8 Qr. Plain Probate Ketters 11 $\frac{1}{2}$ x18.
- 130562 1—8 Qr. Plain Probate Bonds 11 $\frac{1}{2}$ x18.
- 130563 1—8 Qr. Plain Record of Probate Orders
& Decrees.
- 130564 1—8 Qr. Plain Record of Probate Pro-
ceedings 11 $\frac{1}{2}$ x18.
- 130565 1—6 Qr. Register of Actions 10 $\frac{1}{2}$ x16.
- 130566 1—8 Qr. Register of Criminal 10 $\frac{1}{2}$ x16.
- 130567 1—8 Qr. Minutes of Proceedings of Dis-
trict Court.
- 130568 1—8 Qr. Judgment Docket with Index
10 $\frac{1}{2}$ x16.
- 130569 1—5 Qr. McMillan General Index to Court
Records.
- 130570 1—5 Qr. McMillan General Index to Court
Records.
- 130571 1—6 Qr. Probate Register 11 $\frac{1}{2}$ x18.
- 130572 1—6 Qr. Judges Criminal Calendar 10 $\frac{1}{2}$
x16.
- 130573 1—6 Qr. Judges Civil Calendar 10 $\frac{1}{2}$ x16.
- 130574 1—6 Qr. Judges Probate Calendar 10 $\frac{1}{2}$ x
16.
- 130575 1—8 Qr. Plain Judgment Book 11 $\frac{1}{2}$ x18.
- 130576 1—8 Qr. Plain Execution Book 11 $\frac{1}{2}$ x18.
- 130577 1—6 Qr. Declarations of Intention In-
dexed.

12 *Shaw and Borden Co., a Corporation,*

- 130578 1—6 Qr. Naturalization—Final Papers.
130579 1—5 Qr. Witness & Jurors Time Books.
130580 1—6 Qr. Clerk's Fee Book 21x16.
130581 1—4 Qr. Index to Marriages 10½x16.
130582 1—6 Qr. Marriage Record 10½x16.
130583 1—4 Qr. Register of Adoption Reform
 School & Asylum.
130584 1—6 Qr. Inventory & Appraisement
 Record.
140585 1—4 Qr. Register of Inheritance Tax 18
 x16.
130586 1—5 Qr. Record of Fees Collected 11½x
 18.
130696 1 M. Litho. Juror's Certificates—4 on
 page.
130697 1 M. Witness Certificates—4 on.
130319 1—6 Qr. Recorder's Fee & Reception
 Book.
130501 1—8 Qr. Water Right Record #2 11½
 x18.
130502 1—8 Qr. Water Right Record #3 11½x18.
130503 1—8 Qr. Mortgage Record #2 11½x18.
130504 1—8 Qr. Printed Page Mortgage Record
 #3.
130505 1—8 Qr. Mortgage Record #4 11½x18.
130506 1—8 Qr. Patent Record—Desert 11½x18.
130507 1—8 Qr. Patent Record Homestead 11½
 x18.
130508 1—8 Qr. Clerk's General Record 11½x18.
130509 1—4 Qr. License Register 11½x18.
130510 1—8 Qr. Clerk's Reg. of Treas. Receipts.

- 130511 1—8 Qr. Clerk's Reg. of Treas. Disbursements.
- 130512 1—6 Qr. Register of Warrants 20 $\frac{1}{4}$ x17 $\frac{3}{4}$.
- 130513 1—8 Qr. Index to Deeds—Grantor 14x17.
- 130514 1—8 Qr. McMillan Loose Leaf Index to Deeds Grantee.
- 130515 1—8 Qr. McMillan L. L. Index to Mtg. Property D.
- 130516 1—8 Qr. McMillan L. L. Index to Mtg. Real Property Inventory.
- 130517 1—8 Qr. McMillan L. L. Index to Mtg. Per. Property Inventory.
- 130518 1—8 Qr. McMillan L. L. Index to Mtg. Per. Property Direct.
- 130519 1—6 Qr. McMillan L. L. Index to Attachments and Writs of Execution with Index 14x17.
- 130520 1—6 Qr. McMillan L. L. Index to Liens & Index.
- 130521 1—8 Qr. McMillan L. L. Index to Water Rights, Estrays & Lost Property 14x17.
- 130528 1—8 Qr. McMillan L. L. Miscellaneous Index Direct.
- 130523 1—8 Qr. McMillan L. L. Miscellaneous Index Inverse.
- 130541 1—8 Qr. Deed Record #2 11 $\frac{1}{2}$ x18.
- 130542 1—8 Qr. Index to Assignments of Mortg. & Leases.
- 130543 1—8 Qr. Index to Official Bonds, Wills & Power of Atty.
- 130544 1—8 Qr. Index to Transcript of Judg-

14 *Shaw and Borden Co., a Corporation,*

- ments, Notices of Action & Certificate
 of Sale 11½x18.
- 130545 1—8 Qr. Index to Quartz Placer & Annual
 Work Done on Mining Claims 11½x18.
- 130546 1—6 Qr. Index to Assignment for benefit
 of Creditors and Separate Property of
 Married Women.
- 130547 1—8 Qr. Record of Bounty Claims 11½x
 18.
- 130548 1—8 Qr. McMillan L. L. Road Record 11½
 x18.
- 130549 1—6 Qr. Tax Sale Record with Index at
 Front 21x18.
- 130550 1—8 Qr. Plain Mortgage Record 11½x18.
- 130551 1—8 Qr. Plain Deed Record 11½x18.
- 130552 1—8 Qr. Plain Miscellaneous Record 11½
 x18.
- 130553 1—8 Qr. Satisfaction of Mortgage 11½x
 18.
- 130554 1—8 Qr. Plain Water Right Record 11½
 x18.
- 130555 1—8 Qr. Plain Record of Mining Loca-
 tions 11½x18.
- 130556 1—8 Qr. Plain Record of Liens 11½x18.
- 130557 1—4 Qr. Separate Property of Married
 Women 11½x18.
- 130558 1—8 Qr. Plain Record Order & Decrees
 11½x18.
- 130559 1—9 Qr. Plain Record of Powers of Atty.
 11½x18.
- 130590 1—6 Qr. School Road & Tp. Dist. Record
 & Index.

- 130693 1 L. L. Record Commissioners Proceedings.
- 130698 250 Marriage Licenses & Certificates.
- 130694 1 Special Index to Commissioners Proceedings.
- 130695 1 M. Litho. & Printed General Warrants.
1 M. Litho. & Printed Bridge Warrants.
- 130695 1 M. Litho. & Printed Road Warrants.
1 M. " " " Contingent.
1 M. " " " Poor.

(Indorsed) : No. 367. Title of Court and Cause. Complaint. Filed Dec. 13th, 1913. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy.

That thereafter and on the 13th day of December, 1913, a summons was issued in said cause in the words and figures following, to-wit:

*United States of America—District Court of the
United States, District of Montana.*

SHAW AND BORDEN COMPANY, a corporation,
Plaintiff,

vs.

HILL COUNTY,

Defendant.

ACTION BROUGHT IN THE SAID DISTRICT COURT, AND
THE COMPLAINT FILED IN THE OFFICE OF THE
CLERK OF SAID DISTRICT COURT, IN THE CITY OF
HELENA, COUNTY OF LEWIS AND CLARK.

*The President of the United States of America,
Greeting:*

TO THE ABOVE NAMED DEFENDANT—Hill
County, You are hereby summoned to answer the
complaint in this action which is filed in the office

of the Clerk of this Court, a copy of which is herewith served upon you, and to file your answer and serve a copy thereof upon the Plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case your failure to appear or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

WITNESS, the Honorable GEO. M. BOURQUIN, Judge of the United States District Court, District of Montana this 13th day of December, in the year of our Lord one thousand nine hundred and thirteen and of our Independence the 138. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk.

(Seal).

UNITED STATES MARSHAL'S OFFICE,
District of Montana.—

I HEREBY CERTIFY, that I received the within summons on the 15th day of December, 1913 and personally served the same on the 16th day of December, 1913, on the within named defendant Hill County, by delivering to and leaving with Ever Neilson, Chairman of the Board of County Commissioners of said Hill County, personally, at 26 at His Ranch miles Southeast of Havre, Hill County, in said District, a certified copy thereof, together with a copy of the Complaint, certified to by Geo. W. Sproule, Clerk, attached hereto.

Dated this 16th day of December, 1913.

WILLIAM LINDSAY,

U. S. Marshal.

By CHARLES MORGAN,

Deputy.

(Endorsed): No. 367. Title of Court and Cause. Summons. Filed Dec. 20th, 1913. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk.

That thereafter and on the 5th day of January, 1914, the defendant filed its demurrer in said cause in words and figures following, to-wit:

In the District Court of the United States

District of Montana.

SHAW AND BORDEN COMPANY, a corporation,
Plaintiff,

vs.

HILL COUNTY,

Defendant.

DEMURRER.

Comes now the above-named defendant and demurs to plaintiff's complaint herein, and for cause of demurrer alleges:

That the complaint does not state facts sufficient to constitute a cause of action.

WHEREFORE, defendant prays that this action be dismissed and that defendant be given judgment against the plaintiff for its costs herein.

VICTOR R. GRIGGS,

County Attorney Hill County and Attorney for
Defendant.

(Endorsed): No. 367. Title of Court and

18 *Shaw and Borden Co., a Corporation,*
Cause. Demurrer. Filed Jan. 5, 1914. Geo. W.
Sproule, Clerk.

That thereafter and on the 16th day of January, 1914, the following order was made in said cause:

*In the District Court of the United States in and
for the District of Montana.*

No. 367, Shaw & Borden Co. v. Hill County.

This cause came on regularly for hearing at this time upon demurrer to complaint, M. S. Gunn, Esq., appearing for the plaintiff and there being no appearance on behalf of defendant. Thereupon demurrer argued and submitted; and thereupon, after due consideration, demurrer overruled and defendant granted 20 days to answer.

Entered in open court January 16, 1914.

GEO. W. SPROULE, Clerk.

(Seal of Court.)

Attest a true copy.

GEO. W. SPROULE, Clerk.

By C. R. GARLOW, Deputy.

That thereafter and on the 24th day of February, 1914, the defendant filed its answer in said cause in words and figures following, to-wit:

*In the District Court of the United States,
District of Montana.*

SHAW AND BORDEN COMPANY, a corporation,
Plaintiff,

vs.

HILL COUNTY,

Defendant.

ANSWER.

Comes now the above named defendant and for its answer to the complaint of the plaintiff on file herein:

1. Admits the allegations of paragraphs I, II, III, IX and X of said complaint.

2. Admits that on or about the 3rd day of March, 1912, this answering defendant made and entered into a certain contract in writing with one B. B. Weldy, proprietor and publisher of a newspaper which had been published in the County of Hill, Montana, for more than six months prior to the date last aforesaid, a copy of which said contract is hereto annexed, marked Exhibit "A", and hereby made a part hereof. That said Exhibit "A" is the only contract ever entered into by this answering defendant with the said B. B. Weldy.

3. This answering defendant does aver and allege that subsequent to the 3rd day of March, 1912, the same B. B. Weldy sublet to plaintiff that portion of Exhibit "A" hereto attached embracing the items contained in Exhibit "A" attached to plaintiff's complaint, under which contract of subletting the plaintiff agreed to sell, furnish and deliver to the said B. B. Weldy that certain portion of the property mentioned in Exhibit "A" hereto attached set out and described in Exhibit "A" attached to plaintiff's complaint. That thereafter under said agreement with the said B. B. Weldy said plaintiff furnished and delivered as directed by the said B. B. Weldy all and singular the books

and other property described in Exhibit "A" attached to plaintiff's complaint, the same and all thereof being delivered to this answering defendant under the terms of Exhibit "A" hereto attached and not otherwise. That this answering defendant never at any time entered into any contract of any nature or character with plaintiff, nor did this answering defendant at any time purchase or receive from or agree to purchase or receive from the plaintiff any property of any kind whatsoever.

4. That under and by the terms of section 2897 of the Revised Codes of the State of Montana the said B. B. Weldy in and about any subletting of any portion of said contract, Exhibit "A" hereto attached, which he might not be able to execute, was required to sublet the same to some newspaper or printing establishment within the State of Montana competent to execute such work. That notwithstanding said statute, and in contravention thereof, the said plaintiff, as aforesaid, entered into the contract of subletting aforesaid with said Weldy whereby said plaintiff agreed to and did furnish under the direction of the said B. B. Weldy all and singular the items and property set out in Exhibit "A" attached to plaintiff's complaint. And this answering defendant does further allege that at and before said plaintiff so entered into said contract of subletting with said Weldy it, said plaintiff, was notified and advised of the terms of said statute and that any subletting by the said Weldy to the plaintiff of any portion of the work to be done or supplies to be

furnished under Exhibit "A" hereto attached was prohibited by law and would be wholly illegal, but that said plaintiff thereafter, notwithstanding being so advised and with full knowledge of said statute, elected to enter into said contract of subletting with the said B. B. Weldy for the furnishing to him of said supplies and property mentioned in Exhibit "A" attached to plaintiff's complaint, alleging and averring that said statute was unconstitutional and unenforcible, and that it, said plaintiff, would take the chances of recovering upon any contract of subletting so entered into in contravention of law.

5. This answering defendant admits that plaintiff has never owned or published a newspaper and has never owned or operated a printing establishment in the State of Montana.

6. This answering defendant does further aver and allege that subsequent to said 3rd day of March, 1913, and on or about the 29th day of April, 1912, one P. H. Hersey, then and there a resident and tax-payer within the County of Hill, State of Montana, commenced in the District Court of the Twelfth Judicial District of the State of Montana in and for the County of Hill, a certain action wherein said P. H. Hersey was plaintiff and Ever Neilson, Joseph Berthelote and E. C. Tooley, comprising the Board of County Commissioners of the County of Hill, Montana, and J. A. Rose, County Treasurer of Hill County, Montana, were defendants, to enjoin and restrain the allowance and payment to the said B. B. Weldy of any sums

of money out of the county treasury of the County of Hill for any of the items contained in Exhibit "A" attached to defendant's answer, the doing and furnishing of which had been, as hereinbefore set forth, sublet by the said B. B. Weldy to the plaintiff herein; that thereafter such proceedings were had in said cause in said court that a judgment was duly made and rendered therein on the 18th day of November, 1912, perpetually enjoining and restraining all and singular the said defendants named in said action, save and except the County Treasurer of the County of Hill, and their and each of their servants, agents, attorneys, employees and successors in office, from auditing, allowing or approving any accounts or claims of said B. B. Weldy for any work done or supplies furnished by him under Exhibit "A" hereto attached, the items of which were embraced within the portion of said contract sublet to the plaintiff herein, and from directing the issuance of any warrants of the said County of Hill therefor; and perpetually enjoining and restraining the County Treasurer of the County of Hill, and his agents, servants, employees or successors in office, from paying to said B. B. Weldy any moneys of the County of Hill for work done or supplies furnished under said Exhibit "A" hereto attached, the items of which are embraced within that portion of said Exhibit "A" sublet to the plaintiff herein. That thereafter the defendants named in said action appealed from said judgment to the Supreme Court of the State of Montana; and

thereafter such proceedings were had in said cause in said Supreme Court that said judgment was in all respects affirmed, and said judgment ever since such affirmance has been and now is in full force and effect and a final judgment in said cause.

7. This answering defendant denies each and every allegation in said complaint contained except as hereinbefore specifically admitted or denied.

WHEREFORE defendant prays to be hence dismissed with its costs in this behalf incurred.

VICTOR R. GRIGGS,

C. A. SPAULDING,

Attorneys for Defendant.

EXHIBIT "A".

This agreement, made this 8th day of March, 1912, by and between B. B. Weldy, of Chester, Hill County, State of Montana, party of the first part, and the Board of County Commissioners of Hill County, State of Montana, party of the second part, witnesseth:

That the said party of the first part, in consideration of the covenants on the part of the said party of the second part, hereinbefore mentioned, hereby covenants and agrees to do and perform all the printing for which the said party of the second part may be chargeable, including, all legal advertising required by law to be made, blanks, blank books, and official publications, the same to be done and performed in a workman like manner, the material used to be of first class quality, and

the same to be delivered within a reasonable time after order has been placed at the various offices at the county seat or elsewhere within the county free of all transportation charges, except as otherwise provided herein.

And the said party of the second part, in consideration of the covenants herein recited being done and performed by the said party of the first part, hereby agrees to pay to the said party of the first part, in county warrants as follows, to-wit:

For blank books, either full bound and flat opening or loose leaf as the said party of the second part may desire, stock number one grade, Byron-Weston, or L. L. Brown Ledger, 40# basis for bound books, 36# basis for loose leaf books, as follows:

Plain, cap size, 8½x14, per quire.....	\$ 1.70
Printed head, cap size 8½x14, per quire.....	2.10
Printed page, cap size, 8½x14, per quire.....	2.95
Plain, demy, size 10½x16, per quire.....	1.80
Printed head, demy size, 10½x16, per quire..	2.20
Printed page, demy size, 10½x16, per quire..	3.10
Plain, med. or D. C. size, 11½x18, per quire..	1.90
Printed head, med. or D. C. or, per quire..	2.30
Printed page, med. or D. C. 14x17, per quire	3.15

The above are for books of six or eight quire, 80 pages to the quire. For books of less than 6 quire, 12% additional per quire. An extra charge for books requiring an index in front or through the book or canvas covers.

For loose leaf record books, as follows:—
6 quire medium book, plain, per book com-

plete	\$17.00
6 quire medium book, printed head, per book	20.20
8 quire medium book, plain, per book.....	18.50
8 quire medium book, printed head, per book	21.70

For all books requiring double forms, an extra charge of one-third of the additional charge for a printed head or a printed page over the charge for a plain book.

All of the above books are to be f. o. b. Spokane, Wash.

For all publishing and legal advertising, except commissioners proceedings and rule and figure work, the statutory prices named in section 2897, Revised Codes of Montana, less a discount of Sixty per cent. (60%).

For all rule and figure work, the statutory prices named in section 2897, Revised Codes of Montana, less a discount of fifty per cent. (50%).

For legal blanks, all sizes, the statutory prices named in section 2897, Revised Codes of Montana, less a discount of Forty per cent. (40%).

For stationery printed from letter press forms, as follows:—

	1000	500
Letter heads, 20# bond or ledger paper	\$3.35	\$2.00
Memo or note heads, 20# bond or legal paper	2.65	1.55
XXX White envelopes, size 6½, good stock	2.60	1.50

XXX White envelopes, size 10,		
good stock	3.80	2.00
XXX White envelopes, size 12,		
good stock	4.00	2.15

For all other work not specified in section 2897, Revised Codes of Montana, not to exceed the prices heretofore charged Chouteau County for similar work.

Said party of the first part further agrees to publish the commissioners proceedings of the said Hill County in the Chester Signal and the several other papers controlled by the said party of the first part within one week after same shall have been furnished by the County Clerk, free of all cost.

And the said party of the first part further agrees to furnish the said party of the second part a good and sufficient bond in the sum of Four Thousand Dollars (\$4,000.00) conditioned upon the faithful performance of the covenants and agreements contained herein on the part of the said party of the first part.

And it is mutually agreed and understood by and between the parties hereto that the covenants herein contained on the part of the said party of the second part shall not be binding on the individual members of the said Board of County Commissioners of Hill County.

Signed in duplicate the day and date above mentioned.

(Signed) B. B. WELDY.

BOARD OF COUNTY COMMISSIONERS

HILL COUNTY, State of Montana.

By. (Signed) EVER NIELSEN

Chairman of said Board.

(Signed) JOHN H. DEVINE,

Clerk of said Board.

Due service of the foregoing answer upon us this 24 day of February, 1914, and receipt of a copy thereof is hereby admitted.

GUNN, RASCH & HALL,

Attorneys for Plaintiff.

(Endorsed): No. 367. Title of Court and Cause. Answer. Filed and entered Feb. 24, 1914. Geo. W. Sproule, Clerk.

That thereafter and on the 16th day of March, 1914, the plaintiff filed its reply in said cause in words and figures following, to-wit:

In the District Court of the United States, for the District of Montana.

(Helena Division).

SHAW & BORDEN COMPANY, a corporation,

Plaintiff,

v.

HILL COUNTY,

Defendant.

REPLY.

Comes now the above named plaintiff, and for reply to defendant's answer on file herein:

I.

Admits that the contract referred to in Paragraph 2 of said answer was entered into as in said paragraph alleged and that Exhibit "A" attached

to said answer is a true copy of said contract. Denies any knowledge or information sufficient to form a belief as to the allegation that said contract is the only contract ever entered into by defendant and said B. B. Weldy.

II.

Admits that subsequent to the making of said contract said Weldy sublet to plaintiff that portion of said Exhibit "A" attached to said answer, embracing the books and other property mentioned in Exhibit "A" attached to plaintiff's complaint.

III.

Admits that the statute referred to in Paragraph 4 of said answer forbade said Weldy to sublet any portion of said contract except to some newspaper or printing establishment within the state of Montana competent to execute such work, and that plaintiff knew of the provisions of said statute prior to said subletting of said contract. Admits that plaintiff has contended that said statute was unconstitutional and unenforceable.

IV.

Admits the allegations of Paragraph 6 of said answer.

V.

Denies each and every affirmative allegation in said answer contained not herein specifically admitted or denied.

WHEREFORE, having fully replied, plaintiff

asks judgment as prayed for in its complaint.

GUNN, RASCH & HALL,

Attorneys for Plaintiff.

Service accepted March 16, 1914.

C. A. SPAULDING,

Per V. L. McCARTHY.

STATE OF MONTANA,

County of Lewis and Clark.—ss.

M. S. Gunn, being first duly sworn, deposes and says:

That he is one of the attorneys for the plaintiff in the above entitled action; that he has read the foregoing reply and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief; that the reason he makes this verification is because there is no officer of said plaintiff now within the County of Lewis and Clark, wherein affiant resides.

M. S. GUNN.

Subscribed and sworn to before me this 14th day of March, 1914.

(Notarial Seal). W. W. PATTERSON,

Notary Public for the State of Montana,
Residing at Helena, Montana.

My Commission expires May 6, 1914.

(Endorsed): No. 367. Title of Court and Cause. Reply. Filed and entered Mar. 16, 1914. Geo. W. Sproule, Clerk.

That thereafter and on the 31st day of July, 1914, there was filed in said cause an agreed statement of facts in words and figures following, to-wit:

30 *Shaw and Borden Co., a Corporation,*
 In the District Court of the United States,
 District of Montana.

SHAW & BORDEN COMPANY, a corporation,
Plaintiff,

vs.

HILL COUNTY,

Defendant.

It is hereby stipulated that the following is a correct statement of the facts in this case:

1. That the plaintiff is and was at all the times mentioned in the complaint a corporation, organized and existing under and by virtue of the laws of the State of Washington, and a citizen of said state.

2. That the defendant is now and was at all the times mentioned in the complaint a county, created, organized and existing under and by virtue of the laws of the State of Montana and a citizen of said state.

3. That the amount in controversy in this action exceeds the sum of \$3,000, exclusive of interest and costs.

4. That on or about the 3rd day of March, 1912, the defendant made and entered into a contract in writing with one B. B. Weldy, proprietor and publisher of a newspaper, which had been published in said county more than six months prior thereto, a copy of which contract is attached to and made a part of the answer in this case. That said contract is the only contract ever made by said Weldy with said defendant.

5. That the said Weldy sublet to plaintiff that

portion of said contract embracing the items described in exhibit "A" to the complaint herein and the plaintiff thereupon and thereby agreed with said Weldy to perform such portion of said contract by furnishing and delivering to said defendant the said items of property.

6. That plaintiff by virtue of the said subletting of the said contract and the agreement with said Weldy as aforesaid, did furnish and deliver to said defendant all of the books and other property described in exhibit "A" to said complaint.

7. That this plaintiff has never owned or published a newspaper and has never owned or operated a printing establishment in the State of Montana.

8. That prior to the subletting of said contract by said Weldy, as aforesaid, plaintiff had knowledge of section 2897 of the Revised Codes of the State of Montana, but had been advised by attorneys, whose opinion it sought, that said section was unconstitutional and void, and relying upon such advice and believing the said section void, furnished and delivered the said books and other property to defendant.

9. That subsequent to said 3rd day of March, 1912, and on or about the 29th day of April, 1912, one P. H. Hersey, then and there a resident and tax-payer within the County of Hill, State of Montana, commenced in the District Court of the Twelfth Judicial District of the State of Montana, in and for the County of Hill, a certain action wherein said P. H. Hersey was plaintiff and Ever

Neilson, Joseph Berthelote and E. C. Tooley, comprising the Board of County Commissioners of the County of Hill, Montana, and J. A. Rose, County Treasurer of Hill County, Montana, were defendants, to enjoin and restrain the allowance and payment to the said B. B. Weldy of any sums of money out of the county treasury of the County of Hill for any of the items contained in Exhibit "A" attached to defendant's answer, the doing and furnishing of which had been, as hereinbefore set forth, sublet by the said B. B. Weldy to the plaintiff herein; that thereafter such proceedings were had in said cause in said court that a judgment was duly made and rendered therein on the 18th day of November, 1912, perpetually enjoining and restraining all and singular the said defendants named in said action, save and except the County Treasurer of the County of Hill, and their and each of their servants, agents, attorneys, employees, successors in office, from auditing, allowing or approving any accounts or claims of said B. B. Weldy for any work done or supplies furnished by him under Exhibit "A" hereto attached, the items of which were embraced within the portion of said contract sublet to the plaintiff herein, and from directing the issuance of any warrants of the said County of Hill therefor; and perpetually enjoining and restraining the County Treasurer of the County of Hill, and his agents, servants, employees or successors in office from paying to said B. B. Weldy any moneys of the County of Hill for work done or supplies fur-

nished under said Exhibit "A" hereto attached, the items of which are embraced within that portion of said Exhibit "A" sublet to the plaintiff herein. That thereafter the defendants named in said action appealed from said judgment to the Supreme Court of the State of Montana, and thereafter such proceedings were had in said cause in said Supreme Court that said judgment was in all respects affirmed, and said judgment were since such affirmance has been and now is in full force and effect and a final judgment in said cause. That the opinion and decision of said Supreme Court is reported in Volume 47 of the Montana State Reports at page 132.

10. That the plaintiff was the owner of the property described in exhibit "A" to the complaint at all times before the furnishing and delivery of same to the defendant, pursuant to said subletting and agreement with said Weldy, and the same was on the 8th day of March, 1912, ever since has been and is now of the reasonable value of \$4348.80.

11. That prior to the commencement of this action plaintiff demanded in writing of said defendant a return of said property, or payment of the value thereof, to-wit, the sum of \$4348.80, and presented to said defendant an account or claim for the value of said property, made out in separate items, and in which the nature of each item, as shown by exhibit "A" to the complaint, was stated and in which the value of each of the said items was also stated, which said account or claim

was verified by the affidavit of an officer of the plaintiff, to-wit, its treasurer, according to law; that said claim was presented within one year after the last item therein accrued.

12. That the Board of County Commissioners of said county on December 11, 1913, rejected and disallowed said claim, and refused said demand so made as aforesaid.

13. That the Board of County Commissioners of said Hill County knew prior to receiving said property of the subletting of said contract by said Weldy to plaintiff and received and accepted from said plaintiff the said books and other property with knowledge that the same were being furnished and delivered by plaintiff and that plaintiff was not the owner or publisher of a newspaper published in the State of Montana, or the owner of a publishing establishment in said state, and that said books and other property were sent and shipped from Spokane, Washington, where the business and printing establishment of plaintiff is located.

14. That the said Weldy has never made or presented any claim to said county for said property, or any thereof, or for the value or contract price for said property, or any thereof, and makes no claim to said property, or any thereof, and neither the said county nor the said Weldy has ever paid plaintiff for said property, or any thereof.

And it is stipulated and agreed that the said cause may be submitted to the court for final de-

cision and judgment upon the pleadings and this stipulation.

Dated this 20th day of July, 1914.

GUNN, RASCH & HALL.

Attorneys for Plaintiff.

VICTOR R. GRIGGS,

C. A. SPAULDING,

Attorneys for Defendant.

(Endorsed): No. 367. Title of Court and Cause. Statement of Facts. Filed July 31, 1914. Geo. W. Sproule, Clerk.

That thereafter and on the 25th day of September, 1914, the court filed its written opinion in said cause in words and figures following, to-wit:

United States District Court, Montana.

SHAW AND BORDEN CO.

vs.

HILL COUNTY.

No. 367.

COURT'S DECISION.

Herein, upon the facts agreed upon which the parties submit this case the court concludes plaintiff is entitled to recover of and from defendant the agreed reasonable value of the merchandise defendant received from plaintiff, viz., \$4348.80 and legal interest from Mar. 8, 1912, and costs. Judgment accordingly.

Sept. 25, 1914

BOURQUIN. Judge.

MEMO.

The contract between Weldy and defendant was legal. In performanec, however, an illegal method was adopted. In such performance

plaintiff delivered merchandise to defendant. Under such circumstances title does not pass. The merchandise is still plaintiff's. Defendant refused a demand for its return. It is the settled law of this state that defendant because thereof must pay the reasonable value of the merchandise.

Morse vs. Granite Co. 19 Mont. 450.

The case cited is the same in principle as this, and is conclusive of plaintiff's right to recover.

(Endorsed): No. 367. Shaw and Borden Co. vs. Hill Co. Memo. Filed Sept. 25, 1914. Geo. W. Sproule, Clerk.

That thereafter and on the 25th day of September, 1914, judgment was duly entered in said cause, which judgment is in the words and figures following, to-wit:

*In the District Court of the United States,
District of Montana.*

SHAW & BORDEN COMPANY, a corporation,
Plaintiff,

vs.

HILL COUNTY,

Defendant.

NO. 367.

JUDGMENT.

This cause having come on regularly for trial before the court without a jury and having been submitted for decision and judgment on the pleadings and the agreed statement of facts filed therein, and the court having heard the arguments of the attorneys for the respective parties and

having duly considered said pleadings and agreed statement of facts, it is now ordered, adjudged and decreed that the plaintiff do have and recover of and from the defendant the sum of \$4621.39 with interest thereon from this date at the rate of eight per cent per annum and costs hereby taxed at the sum of \$27.60.

Dated and entered this 25th day of September, 1914.

GEO. W. SPROULE, Clerk.

(Seal of Court.)

Attest a true copy

GEO. W. SPROULE, Clerk.

By C. R. GARLOW, Deputy.

UNITED STATES OF AMERICA,

District of Montana.—ss.

I, George W. Sproule, Clerk of the United States District Court for the District of Montana, do hereby certify that the foregoing papers hereto annexed constitute the Judgment Roll in the above entitled action.

Witness my hand and the seal of said Court at Helena, Montana, this 25th day of September, A. D. 1914.

(Seal of Court.)

GEO. W. SPROULE,

Clerk.

By C. R. GARLOW,

Deputy Clerk.

(Endorsed): No. 367. Title of Court and Cause. Judgment Roll. Filed and entered Sept.

38 *Shaw and Borden Co.; a Corporation,*
25, 1914. Geo. W. Sproule, Clerk. By C. R. Gar-
low, Deputy Clerk.

That thereafter and on the 5th day of October, 1914, defendant presented for settlement its bill of exceptions in said cause, which said bill of exceptions was on said day duly settled and allowed, and is in words and figures following, to-wit:

*In the District Court of the United States,
Ninth Circuit, District of Montana.*

SHAW & BORDEN COMPANY, a corporation,

vs.

HILL COUNTY,

Defendant.

BILL OF EXCEPTIONS.

Be it remembered that upon the trial of this cause and the submission thereof for decision to the Honorable George M. Bourquin on the 25th day of September, 1914, a jury was waived and said cause submitted upon an agreed statement of facts, which said agreed statement of facts is in words and figures following, to-wit:

*"In the District Court of the United States
District of Montana.*

SHAW & BORDEN COMPANY, a corporation,

Plaintiff,

vs.

HILL COUNTY,

Defendant.

It is hereby stipulated that the following is a correct statement of the facts in this case:

1. That the plaintiff is and was at all the times

mentioned in the complaint a corporation, organized and existing under and by virtue of the laws of the State of Washington, and a citizen of said state.

2. That the defendant is now and was at all the times mentioned in the complaint a county, created, organized and existing under and by virtue of the laws of the State of Montana and a citizen of said state.

3. That the amount in controversy in this action exceeds the sum of \$3000, exclusive of interest and costs.

4. That on or about the 3rd day of March, 1912, the defendant made and entered into a contract in writing with one B. B. Weldy, proprietor and publisher of a newspaper, which had been published in said county more than six months prior thereto, a copy of which contract is attached to and made a part of the answer in this case. That said contract is the only contract ever made by said Weldy with said defendant.

5. That the said Weldy sublet to plaintiff that portion of said contract embracing the items described in exhibit 'A' to the complaint herein and the plaintiff thereupon and thereby agreed with said Weldy to perform such portion of said contract by furnishing and delivering to said defendant the said item of property.

6. That plaintiff by virtue of the said subletting of the said contract and the agreement with said Weldy as aforesaid, did furnish and deliver to said defendant all of the books and other

property described in exhibit 'A' to said complaint.

7. That this plaintiff has never owned or published a newspaper and has never owned or operated a printing establishment in the State of Montana.

8. That prior to the subletting of said contract by said Weldy, as aforesaid, plaintiff had knowledge of section 2897 of the Revised Codes of the State of Montana, but had been advised by attorneys, whose opinion it sought, that said section was unconstitutional and void, and relying upon such advise and believing the said section void, furnished and delivered the said books and other property to defendant.

9. That subsequent to said 3rd day of March, 1912, and on or about the 29th day of April, 1912, one P. H. Hersey, then and there a resident and tax-payer within the County of Hill, State of Montana, commenced in the District Court of the Twelfth Judicial District of the State of Montana, in and for the County of Hill, a certain action wherein said P. H. Hersey was plaintiff and Ever Neilson, Joseph Berthelote and E. C. Tooley, comprising the Board of County Commissioners of the County of Hill, Montana, and J. A. Rose, County Treasurer of Hill County, Montana, were defendants, to enjoin and restrain the allowance and payment to the said B. B. Weldy of any sums of money out of the county treasury of the County of Hill for any of the items contained in Exhibit 'A' attached to defendant's answer, the do-

ing and furnishing of which had been, as hereinbefore set forth, sublet by the said B. B. Weldy to the plaintiff herein; that thereafter such proceedings were had in said cause in said court that a judgment was duly made and rendered therein on the 18th day of November, 1912, perpetually enjoining and restraining all and singular the said defendants named in said action, save and except the County Treasurer of the County of Hill, and their and each of their servants, agents, attorneys, employees, successors in office, from auditing, allowing or approving any accounts or claims of said B. B. Weldy for any work done or supplies furnished by him under Exhibit 'A' hereto attached, the items of which were embraced within the portion of said contract sublet to the plaintiff herein, and from directing the issuance of any warrants of the said County of Hill therefor; and perpetually enjoining and restraining the County Treasurer of the County of Hill, and his agents, servants, employees or successors in office, from paying to said B. B. Weldy any moneys of the County of Hill for work done or supplies furnished under said Exhibit 'A' hereto attached, the items of which are embraced within that portion of said Exhibit 'A' sublet to the plaintiff herein. That thereafter the defendants named in said action appealed from said judgment to the Supreme Court of the State of Montana, and thereafter such proceedings were had in said cause in said Supreme Court that said judgment was in all respects affirmed, and said judgment

were since such affirmance has been and now is in full force and effect and a final judgment in said cause. That the opinion and decision of said Supreme Court is reported in volume 47 of the Montana State Reports at page 132.

10. That the plaintiff was the owner of the property described in exhibit 'A' to the complaint at all times before the furnishing and delivery of same to the defendant, pursuant to said subletting and agreement with said Weldy, and the same was on the 8th day of March, 1912, ever since has been and is now of the reasonable value of \$4348.80.

11. That prior to the commencement of this action plaintiff demanded in writing of said defendant a return of said property, or payment of the value thereof, to-wit, the sum of \$4348.80, and presented to said defendant an account or claim for the value of said property, made out in separate items, and in which the nature of each item, as shown by exhibit 'A' to the complaint, was stated and in which the value of each of the said items was also stated, which said account or claim was verified by the affidavit of an officer of the plaintiff, to-wit, its treasurer, according to law; that said claim was presented within one year after the last item therein accrued.

12. That the board of county commissioners of said county on December 11, 1913, rejected and disallowed said claim, and refused said demand so made as aforesaid.

13. That the Board of County Commissioners of said Hill County knew prior to receiving said

property of the subletting of said contract by said Weldy to plaintiff and received and accepted from said Plaintiff the said books and other property with knowledge that the same were being furnished and delivered by plaintiff and that plaintiff was not the owner or publisher of a newspaper published in the State of Montana, or the owner of a publishing establishment in said state, and that said books and other property were sent and shipped from Spokane, Washington, where the business and printing establishment of plaintiff is located.

14. That the said Weldy has never made or presented any claim to said county for said property, or any thereof, or for the value or contract price for said property, or any thereof, and makes no claim to said property, or any thereof, and neither the said county nor the said Weldy has ever paid plaintiff for said property, or any thereof.

And it is stipulated and agreed that the said cause may be submitted to the court for final decision and judgment upon the pleadings and this stipulation.

Dated this 20th day of July, 1914.

GUNN, RASCH & HALL,

Attorneys for Plaintiff.

VICTOR R. GRIGGS,

C. A. SPAULDING,

Attorneys for Defendant."

Endorsed: "Filed July 31, 1914, Geo. W. Sproule, Clerk."

That the foregoing together with the admissions contained in the pleadings constituted all the facts upon which said cause was submitted to the court for decision and by the court determined. That upon the foregoing agreed statement of facts the court on the 25th day of September, 1914, entered judgment in favor of the plaintiff and against the defendant in manner and form as the same appears of record. To which judgment and to the entry thereof defendant by its counsel then and there duly excepted.

And for as much as the matters aforesaid do not otherwise appear of record defendant prays the court to sign and seal this bill of exceptions and make the same a part of the said record, which is done accordingly this 5th day of October, A. D. 1914.

GEO. M. BOURQUIN,

United States District Judge for the District of
Montana.

The undersigned as attorneys for the above named plaintiff hereby acknowledge due and timely service of the foregoing proposed bill of exceptions this 2nd day of October, 1914, and hereby stipulate and agree that no amendments will be submitted to such proposed bill of exceptions and that the same may be by the judge of the above entitled court settled, signed and allowed at any time after this date without notice to said plaintiff.

GUNN, RASCH & HALL,

Attorneys for Plaintiff.

Dated Helena, Montana, October 2, 1914.

(Endorsed): No. 367. Title of Court and Cause. Bill of Exceptions. Filed Oct. 5, 1914. Geo. W. Sproule, Clerk.

That thereafter and on the 5th day of October, 1914, the defendant filed in said cause its petition for writ of error and supersedeas, in words and figures following, to-wit:

*In the District Court of the United States,
District of Montana.*

SHAW AND BORDEN COMPANY, a Corporation,
Plaintiff,

vs.

HILL COUNTY,

Defendant.

PETITION FOR WRIT OF ERROR AND SUPERSEDEAS.

Now comes Hill County, the defendant in the above entitled action, and says that on the 25th day of September, 1914, at the April 1914 term of said court, a judgment was rendered upon an agreed statement of facts theretofore submitted in said cause in favor of the plaintiff in the above entitled cause against the defendant for the sum of forty-three hundred and forty-eight and 80/100 dollars, and for costs of suit in the rendition of which said judgment and in the records and proceedings had prior thereto certain manifest errors have intervened to the great prejudice of the said defendant, which errors are specified in detail in the assignment of errors filed with this petition; wherefore the defendant in the above entitled cause, feeling itself aggrieved by the judgment of

the court rendered upon said agreed statement of facts and entered herein, comes now by C. A. Spaulding and Victor R. Griggs, its attorneys, and petitions said court for an order allowing said defendants to prosecute a writ of error to the Honorable the United States Circuit Court of Appeals for the Ninth Circuit under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which the said defendant shall give and furnish upon said writ of error and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit;

And the said defendant herewith presents its assignment of errors in accordance with the rules of the said United States Circuit Court of Appeals and the course and practice of this honorable court.

And your petitioner the said defendant will ever pray, etc.

C. A. SPAULDING,
VICTOR R. GRIGGS,

Attorneys for said Defendant.

(Endorsed): No. 367. Title of Court and Cause. Petition for Writ of Error and Superseedeas. Filed Oct. 5th, 1914. Geo. W. Sproule, Clerk.

That on the said 5th day of October, 1914, the

defendant filed in said cause its assignment of errors in words and figures following, to-wit:

*In the District Court of the United States,
Ninth Circuit, District of Montana.*

SHAW AND BORDEN COMPANY, a Corporation,
Plaintiff,

vs.

HILL COUNTY,

Defendant.

ASSIGNMENT OF ERRORS.

Comes now the above named defendant on this 3rd day of October, 1914, and says that the judgment entered in the above cause on the 25th day of September, 1914, is erroneous and unjust to the defendant, and assigns and specifies the following errors committed by the court in the rendition and entry thereof.

1. The court erred in holding and deciding that the contract entered into between plaintiff and one B. B. Weldy, although contrary to law and therefore void, was still susceptible of substantial enforcement against this defendant, which substantial enforcement consists of a judgment requiring defendant to pay the value of the goods delivered thereunder.

2. The court erred in holding and deciding that, notwithstanding the conceded invalidity of the contract entered into between plaintiff and B. B. Weldy by reason of the same being in contravention of statute law, plaintiff was entitled to maintain an action for the recovery of property

delivered thereunder or the value thereof from defendant.

3. The court erred in holding and deciding that, notwithstanding plaintiff and defendant were in *pari delicto* in violating the law in entering into the contract of defendant with Weldy and the subsequent contract of subletting by Weldy to plaintiff, under which last mentioned contract plaintiff furnished to defendant the property claimed in this action, plaintiff was entitled to maintain an action against defendant for the recovery of such property or its value.

4. The court erred in holding and deciding that, the contract between plaintiff and Weldy being void, no title to the property delivered thereunder passed to defendant, and that even though such invalidity was by reason of a violation of law in entering into said contract, plaintiff was entitled to recover of defendant such property or the value thereof.

5. The court erred in holding and deciding that plaintiff could maintain an action against defendant upon a transaction arising and growing out of plaintiff's violation of Section 2897 of the Revised Codes of the State of Montana prohibiting contracts for county printing to be sublet to any printing establishment outside the state of Montana.

6. The court erred in holding and deciding that plaintiff was entitled to disaffirm a contract let in contravention of Section 2897 of the Revised Codes of the State of Montana, and which

contract had been fully performed on its part, and thereupon recover whatever of value it had parted with under such contract.

7. The court erred in holding and deciding that plaintiff was entitled to maintain an action at law for the recovery of property parted with by it under a contract entered into in violation of the statutes of the state of Montana.

8. The court erred in holding and deciding that any action could be maintained by plaintiff for the recovery of property parted with by it in a transaction in which plaintiff admitted its violation of the statute law of Montana declaratory of the policy of the state with reference to contracts for the county printing of its municipal sub-divisions.

9. The court erred in holding and deciding that to compel defendant to pay for property delivered to it by plaintiff under a contract entered into in contravention of statutory enactment was undoing what had been wrongfully done, when the effect of the enforcement of such a judgment is to effectuate the performance of such illegal contract.

10. The court erred in holding and deciding that notwithstanding plaintiff's admitted violation of the statute law of Montana in entering into the contract under which it parted with the property received by defendant, and notwithstanding it became and was necessary for plaintiff to show such violation of law in order to establish a cause of action against defendant, still plaintiff was en-

titled to invoke the aid of the courts to recover such property or its value from defendant.

11. The court erred in holding and deciding that notwithstanding the transaction by reason of which plaintiff parted with its property to defendant was one in violation of law, and plaintiff admits in the agreed statement of facts such violation of law, yet plaintiff was entitled to recover such property or its value from defendant.

12. The court erred in holding and deciding that plaintiff could sue for and recover property or its value parted with by it under the terms of a contract entered into by plaintiff with full knowledge that the same was prohibited by the statutes of Montana, and which knowing violation of law it was necessary to prove in order to show how plaintiff parted with its property and how defendant received the same.

13. The court erred in holding and deciding that the agreed statement of facts and the admissions contained in the pleadings were sufficient to justify a judgment in favor of plaintiff.

Wherefore and for divers other errors appearing in the said record and proceedings, said plaintiff in error prays that the said judgment may be reversed, &c.

C. A. SPAULDING,
VICTOR R. GRIGGS,

Attorneys for Plaintiffs in Error.

(Endorsed): No. 367. Title of Court and Cause. Assignment of Errors. Filed Oct. 5, 1914. Geo. W. Sproule, Clerk.

That thereafter and on the 5th day of October, 1914, an order allowing writ of error and fixing supersedeas bond was made and filed in said cause in words and figures following, to-wit:

*In the District Court of the United States,
Ninth Circuit, District of Montana.*

SHAW AND BORDEN COMPANY, a Corporation,
Plaintiff,

vs.

HILL COUNTY,

Defendant.

And now on this day the said defendant having presented and filed its petition for a writ of error, together with an assignment of errors in accordance with the rules of the United States Circuit Court of Appeals for the 9th Circuit in that behalf, and with the course and practice of this Court, It is Ordered that a writ of error be and hereby is allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the judgment heretofore entered herein, and that the amount of bond and security on said writ of error be and it hereby is fixed at the sum of One Thousand dollars.

Dated October 5th, 1914.

GEO. M. BOURQUIN,
Judge United States District Court, District of
Montana.

(Endorsed): No. 367. Title of Court and Cause. Order. Filed and Entered, Oct. 5, 1914. Geo. W. Sproule, Clerk.

That thereafter and on the 20th day of October,

52 *Shaw and Borden Co., a Corporation,*

1914, the defendant filed in said cause its supersedeas bond in words and figures following, to-wit:

*In the District Court of the United States,
Ninth Circuit, District of Montana.*

SHAW AND BORDEN COMPANY, a Corporation,
Plaintiff,

vs.

HILL COUNTY,

Defendant.

Know all men by these presents that the County of Hill, Montana, as principal, and the United States Fidelity & Guaranty Company, a corporation, organized and existing under the laws of the State of Maryland, as sureties, are held and firmly bound unto the Shaw and Borden Company, a corporation, in the full and just sum of One Thousand dollars to be paid to the Shaw and Borden Company, its certain attorney, successors or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents. Sealed with our seals and dated this 16th day of October in the year of our Lord one thousand nine hundred fourteen.

Whereas lately at a term of the District Court of the United States in and for the District of Montana in a suit pending in said court between the said Shaw and Borden Company as plaintiff and the said Hill County as defendant, on the 25th day of September, 1914, a judgment was rendered against the said Hill County for the sum of four

thousand three hundred and forty-eight dollars and eighty cents (\$4348.80) and costs of suit, and the said Hill County having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit and a citation directed to the said Shaw and Borden Company citing and admonishing it to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be holden at San Francisco, California, within thirty days from the date hereof.

Now the condition of the above obligation is such that if the said Hill County shall prosecute its said writ of error to effect and answer all damages and costs if it fails to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

HILL COUNTY, MONTANA,

By EVER NIELSON,

Chairman of its Board of County Commissioners.
UNITED STATES FIDELITY & GUARANTY
COMPANY,

By E. C. CARRUTH,

Agent.

(Corporate Seal).

The within supersedeas bond and undertaking on appeal is hereby approved.

Dated October 20, 1914.

GEO. M. BOURQUIN,

Judge.

(Endorsed): Title of Court and Cause. Su-

54 *Shaw and Borden Co., a Corporation,*
persedeas Bond. Filed Oct. 20, 1914. Geo. W.
Sproule, Clerk.

That thereafter and on the 21st day of October, 1914, a writ of error was issued in said cause in words and figures following, to-wit:

UNITED STATES OF AMERICA.—SS.

The President of the United States, to the Honorable the Judge of the District Court of the United States, for the District of Montana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, between Shaw and Borden Company, a corporation, Plaintiff and Hill County, Defendant, a manifest error hath happened to the great damage of the said Hill County, as by their complaint appears; we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same in the said United States Circuit Court of Appeals for the Ninth Circuit at the City of San Francisco, State of California, within thirty days from the date hereof that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals for the Ninth Circuit may cause

further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, the 21st day of October, in the year of our Lord one thousand nine hundred and fourteen.

GEO. W. SPROULE,

Clerk of the District Court of the United States for the District of Montana.

By C. R. GARLOW,

Deputy Clerk.

(Seal of Court).

Allowed by BOURQUIN, Judge.

UNITED STATES OF AMERICA,

District of Montana.—ss.

In obedience to the foregoing writ I herewith transmit to the United States Circuit Court of Appeals for the Ninth Circuit a true and complete transcript of the record and proceedings in the foregoing entitled cause this 21st day of November, A. D. 1914.

(*True*) Geo W. Sproule
Clerk of United States District Court, District of Montana.

(Endorsed): No. 367. Title of Court and Cause. Writ of Error. Filed October 21, 1914. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy.

That thereafter and on the 22nd day of October, 1914, citation was issued in said cause upon said writ of error, which citation is in the words and figures following, to-wit:

56 *Shaw and Borden Co., a Corporation,*
UNITED STATES OF AMERICA.—SS.

The President of the United States, To Shaw and Borden Company, a Corporation, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco in the State of California, within thirty days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the District of Montana, wherein Shaw and Borden Company, a corporation, is plaintiff and Hill County is defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward Douglass White, Chief Justice of the United States of America, this 22nd day of October, A. D. 1914, and of the Independence of the United States the One hundred and Thirty-eighth.

GEO. M. BOURQUIN,
United States District Judge for the District of Montana.

Received copy of the above citation this 23rd day of October, A. D. 1914.

GUNN, RASCH & HALL,
Attorneys for Shaw and Borden Company, a Corporation.

(Endorsed): Title of Court and Cause. Citation. Filed Oct. 23rd, 1914. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy.

That thereafter and on the 27th day of October, 1914, the defendant filed its praecipe for a transcript of the record, in words and figures following, to-wit:

*In the District Court of the United States,
District of Montana.*

SHAW AND BORDEN COMPANY, a Corporation,
Plaintiff,

vs.

HILL COUNTY,

Defendant.

To the Clerk of the Above Entitled Court,

You will please prepare transcript of the record in this cause, to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, under the writ of error heretofore allowed by said Court and include in the said transcript the following pleadings, proceedings and papers on file, to-wit:

Complaint,

Summons,

Demurrer,

Order of January 16, 1914, overruling Demurrer,

Answer,

Reply,

Agreed Statement of Facts,

Memorandum Opinion of the Court,

Judgment,

Certificate of Clerk to the Judgment Roll,

Bill of Exceptions,

Petition for Writ of Error and Supersedeas,

Assignment of Errors,
Order Allowing Writ of Error and Fixing Supersedeas Bond,
Supersedeas Bond,
Clerk's Certificate to Transcript of Record,
Writ of Error,
Clerk's Return to Writ of Error,
Praecipe for Transcript of Record,
Citation.

Said transcript to be prepared as required by law and the rules of this court and the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

C. A. SPAULDING,
VICTOR R. GRIGGS,
Attorneys for Defendant.

Due service of the foregoing praecipe upon us and receipt of a copy thereof this 27th day of October, A. D. 1914, is hereby acknowledged and admitted.

GUNN, RASCH & HALL,
Attorneys for Plaintiff.

(Endorsed): No. 367. Title of Court and Cause. Praecipe. Filed October 27, 1914. Geo. W. Sproule, Clerk.

That on the 11th day of November, 1914, the following order was made in said cause, to-wit:
SHAW AND BORDEN COMPANY, a corporation,
Plaintiff,

vs.

HILL COUNTY,

Defendant.

No 367.

This day came the defendant Hill County and moved the court to enlarge the time for filing of the record in this cause with the Clerk of the Circuit Court of Appeals to and including the 15th day of December, 1914.

And it appearing to the court that the transcript of record cannot be completed and compared by the Clerk of said District Court by the return day of the citation heretofore issued in this cause, to-wit, the 21st day of November, 1914, and it further appearing from the facts above set forth, and from other facts, that good cause has been shown for enlarging the time fixed by the rule of the Circuit Court of Appeals for the filing of said transcript beyond the return day of the citation issued in this cause.

It is thereupon by and with the consent of plaintiff's counsel given in open court adjudged and ordered that the time for the filing of said transcript of record with the clerk of said Circuit Court of Appeals be and is hereby extended to and including the 15th day of December, A. D. 1914.

GEO. M. BOURQUIN,

Judge United States District Court, District of Montana.

(Endorsed): No. 367. Title of Cause. Order.
Filed ^{November} ~~October~~ 11, 1914. Geo. M. Sproule, Clerk.

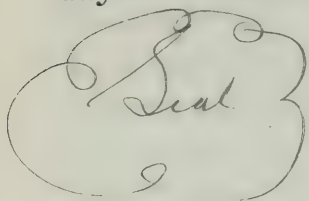
UNITED STATES OF AMERICA,

District of Montana.—ss.

I, George W. Sproule, Clerk of the District Court of the United States for the District of Montana,

do hereby certify the above and foregoing to be a true and complete transcript of record made in accordance with praecipe filed in the cause No. 367 entitled Shaw and Borden Company, a corporation, Plaintiff, vs. Hill County, Defendant, as the same appears on the original records and files of said Court now remaining in my custody and control, ^{that costs of appeal are \$15.00 and have been paid and herewith transmit original}

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at my office in the City of Helena in said District this 21st day of November, A. D. 1914.



G. W. Sprague
Clerk.

2

No. 2520

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

HILL COUNTY,

Plaintiff in Error,

vs.

SHAW AND BORDEN COMPANY, A CORPORA-
TION,

Defendant in Error.

ERROR TO THE DISTRICT COURT OF THE
UNITED STATES FOR THE DISTRICT
OF MONTANA.

BRIEF FOR PLAINTIFF IN ERROR.

C. A. SPAULDING,

L. V. BEAULIEU,

For Plaintiff in Error.

Filed

FEB 10 1915

F. D. Monckton,



IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

HILL COUNTY,

Plaintiff in Error,

vs.

SHAW AND BORDEN COMPANY, A CORPORA-
TION,

Defendant in Error.

ERROR TO THE DISTRICT COURT OF THE
UNITED STATES FOR THE DISTRICT
OF MONTANA.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This writ of error is brought to reverse a judgment for \$4,-648.99 rendered in the District Court in favor of defendant in error and against plaintiff in error in an action by the former to recover from the latter the value of certain personal property. The controversy between the parties arose out of a contract entered into by the plaintiff in error, Hill County, with one B. B. Weldy for the furnishing by Weldy of certain county printing. (Printed Transcript pp. 23-27), and a subsequent contract of subletting of a portion of such contract to defendant in error (Printed Transcript pp. 2-3-19-20-21-30-

31). Under the restrictive terms of the statute law of Montana municipal subdivisions of the state, such as counties, can only contract for the printing required by them with the proprietor of a newspaper which has been published within the county for a period of six months prior to the letting of the contract; and if any portion of such contract is sublet the county must require that it be sublet to some newspaper or printing establishment within the state. The statutory requirements pertinent to the questions raised are found in Section 2897 Revised Codes of Montana, and are as follows:

“It is hereby made the duty of the county commissioners of the several counties of the state of Montana to contract with some newspaper of general circulation, published within the county, and having been published continuously in such county at least six months immediately preceding the awarding of such contract to do and perform all the printing for which said counties may be chargeable, including all legal advertising required by law to be made, blanks, blank books and official publications, at not exceeding the following prices: * * * All newspapers which may receive any contract for printing under this act which may not be able to execute any part of such contract shall be required to sublet such contract or portion to some newspaper or printing establishment within the state, which may be competent to execute such work, at not to exceed the rates herein mentioned.”

The contract of Hill County with Weldy was let to one statutorily qualified to receive the same. (Complaint of defendant in error paragraph IV, Printed Transcript p. 2; Agreed Statement of Facts, paragraph 4, Printed Transcript p. 39.) The contract of subletting by Weldy to defendant in error under the terms of which the property sued for in this action was furnished was in contravention of the statute providing that any such contract of subletting must be to some print-

ing establishment within the state and was therefor void and unenforceable. (Complaint of defendant in error, paragraphs V and VI, Printed Transcript pp. 2-3; Agreed Statement of Facts, paragraphs 5-6-7-8, Printed Transcript pp. 39-40). Such contract of subletting was subsequently adjudicated to be invalid by the Supreme Court of Montana in the case of *Hershey v. Neilson*, 47 Mont. 132, and the Board of County Commissioners of plaintiff in error, Hill County, was permanently enjoined and restrained from allowing or paying any moneys thereunder. (Answer of plaintiff in error paragraph 6, Printed Transcript pp. 21-22; Agreed Statement of Facts, paragraph 9, Printed Transcript pp. 31-32-33).

After the issues had been framed upon the pleadings found in the record (Printed Transcript pp. 2-15; 19-29) the parties filed in the District Court an agreed statement of facts (Printed Transcript pp. 30-35) from which it appears:

1. That defendant in error is a corporation and a citizen of the state of Washington;
2. That plaintiff in error is a duly organized and created county of the state of Montana;
3. That plaintiff in error on the 3rd day of March, 1912, entered into a contract with one B. B. Weldy for certain county printing, the same being the contract attached to the answer filed in this cause;
4. That Weldy sublet certain portions of said contract to defendant in error, and defendant in error under such subletting furnished and delivered to plaintiff in error the property sued for in the present action;
5. That defendant in error has never owned or published a

newspaper and has never owned or operated a printing establishment in the state of Montana;

6. That prior to the aforesaid subletting by Weldy defendant in error knew of the inhibitory provisions of Section 2897 of the Revised Codes of Montana;

7. That after such subletting by Weldy to defendant in error a taxpayer of Hill County brought an action in the District Court of that county to restrain the Board of County Commissioners from allowing and the County Treasurer from paying for any of the property delivered to the county under the subletting by Weldy to defendant in error; that such action eventuated in a judgment permanently restraining and enjoining the Board from allowing and the Treasurer from paying for any of such property; that an appeal was taken from this judgment to the Supreme Court of Montana and the same was there affirmed and that since such affirmance that judgment has been and is now a final judgment in that cause;

8. That the value of the property furnished under the subletting by Weldy to defendant in error was \$4,348.80 and such property belonged to defendant in error at all times before furnishing and delivering the same under said contract;

9. That before commencing the present action defendant in error presented its verified claim for the value of this property to the Board of County Commissioners of plaintiff in error, and that said claim was rejected and disallowed;

10. That plaintiff in error knew before receiving the property sued for that it was furnished by defendant in error under its contract of subletting with Weldy, and likewise knew that defendant in error was not the owner or publisher of a newspaper within the state of Montana and was not the owner or proprietor of a printing establishment within said state;

11. That the property was shipped to plaintiff in error from Spokane, Washington, where the printing establishment of defendant in error is situated

12. That Weldy has never made any claim for the property or its value, and makes no claim thereto;

13. That neither Weldy nor plaintiff in error has paid for said property.

From the foregoing it will be seen that the principal question presented to the District Court and likewise here presented, is whether one who delivers property to another under a contract entered into in violation of a statute, enacted to carry out the public policy that all county printing shall be done within the state, can invoke the aid of the courts to recover the value of such property. The District Court held that such a recovery could be had. To reverse this holding this case is brought here for review.

SPECIFICATION OF ERRORS.

1. The court erred in holding and deciding that the contract entered into between defendant in error and one B. B. Weldy, although contrary to law and therefore void, was still susceptible of substantial enforcement against plaintiff in error, which substantial enforcement consists of a judgment requiring plaintiff in error to pay the value of the goods delivered thereunder.

2. The court erred in holding and deciding that, notwithstanding the conceded invalidity of the contract entered into between defendant in error and B. B. Weldy by reason of the same being in contravention of statute law, defendant in error was entitled to maintain an action for the recovery of the value of property delivered thereunder from plaintiff in error.

3. The court erred in holding and deciding that, notwithstanding the parties hereto were *in pari delicto* in violating the law in entering into the original contract with Weldy and the subsequent contract of subletting by Weldy to defendant in error, under which last mentioned contract defendant in error furnished the property claimed in this action, defendant in error was entitled to maintain an action against plaintiff in error for the recovery of the value of such property.

4. The court erred in holding and deciding that, the contract between defendant in error and Weldy being void, no title to the property delivered thereunder passed to plaintiff in error, and that even though such invalidity was by reason of a violation of law in entering into said contract, still defendant in error was entitled to recover the value of such property.

5. The court erred in holding and deciding that defendant in error could maintain an action against plaintiff in error upon a transaction arising and growing out of the violation by defendant in error of Section 2897 of the Revised Codes of the State of Montana prohibiting contracts for county printing to be sublet to any printing establishment outside of the State of Montana.

6. The court erred in holding and deciding that defendant in error was entitled to disaffirm a contract let in contravention of Section 2897 of the Revised Codes of the State of Montana, which contract had been fully performed on its part, and thereupon recover whatever of value it had parted with under such contract.

7. The court erred in holding and deciding that defendant in error was entitled to maintain an action at law for the recovery of the value of property parted with by it under a con-

tact entered into in violation of the statutes of the state of Montana.

8. The court erred in holding and deciding that any action could be maintained by defendant in error for the recovery of the value of property parted with by it in a transaction in which it admitted its violation of the statute law of Montana declaratory of the policy of the state with reference to contracts for printing furnished to its municipal sub-divisions.

9. The court erred in holding and deciding that to compel plaintiff in error to pay for property delivered to it by defendant in error under a contract entered into in contravention of statutory enactment was undoing what had been wrongfully done, when the effect of the enforcement of such a judgment is to effectuate the performance of such illegal contract.

10 The court erred in holding and deciding that notwithstanding the admitted violation by defendant in error of the statute law of Montana in entering into the contract under which it parted with the property received by plaintiff in error, and notwithstanding it became and was necessary for defendant in error to show such violation of law in order to establish a cause of action against plaintiff in error, still defendant in error was entitled to invoke the aid of the courts to recover the value of such property.

11. The court erred in holding and deciding that notwithstanding the transaction by reason of which defendant in error parted with its property to plaintiff in error was one in violation of law, and defendant in error admits in the agreed statement of facts such violation of law, yet it was entitled to recover the value of such property from plaintiff in error.

12. The court erred in holding and deciding that defend-

and in error could sue for and recover the value of property parted with by it under the terms of a contract entered into by it with full knowledge that the same was prohibited by the statutes of Montana, and which knowing violation of law it was necessary to prove in order to show how it parted with its property and how plaintiff in error received the same.

13. The court erred in holding and deciding that the agreed statement of facts and the admissions contained in the pleadings were sufficient to justify a judgment in favor of defendant in error.

BRIEF OF THE ARGUMENT.

I.

UPON THE MERITS.

Inasmuch as the principal question raised by the specifications of error is whether the District Court erred in rendering judgment in favor of the defendant in error under the agreed statement of facts, it can serve no useful purpose to discuss such specifications of error *seriatim*. They will therefore be first discussed as a whole, upon the principal question suggested, and afterward such questions collateral or incidental to this principal question as seem to the writer to be raised thereby will receive separate consideration.

The fundamental reason why the District Court was in error in rendering judgment in favor of the defendant in error, lies in the admitted fact that its cause of action in the case at bar arises out of its deliberate violation of a statute of Montana. This violation of law consisted in defendant in error entering into the contract of subletting with Weldy for the furnishing by it to Hill County of the printing and printed matter sued for

in the case at bar and the furnishing of the same thereunder. Section 2897 of the Revised Codes of Montana of 1907, above quoted, prohibits the entering into of such a contract. The Supreme Court of Montana held this particular contract of subletting invalid and unenforcible.

Hershey v. Neilson, 47 Mont. 132.

The contract, therefore, being illegal and not susceptible of enforcement, no rights growing out of the same or arising by virtue of acts done thereunder can be enforced. Hence defendant in error should not have been permitted to recover in the case at bar.

Speaking generally it may be said that a county is liable upon *quantum meruit*, the same as an individual, for property received and retained by it, when no statute limits or forbids the exercise of its power to make a contract therefor; but no recovery can be had and no liability exists if the contract or transaction out of which the cause of action sued on arose was in violation of the express terms of a statute, as in the case at bar.

In the case of *Mulnix v. Mutual Benefit Life Insurance Company*, 33 L. R. A. 827 the Supreme Court of Colorado had practically the identical question involved in the case at bar under consideration. In that case the court said:

“The claim is further made that the state has had the benefit of the goods purchased, and should be liable as under an implied contract, or upon a *quantum meruit*. It has been held that a municipal corporation may be bound upon an implied contract made by its agent. Such contract, however, must be within the scope of the corporate powers, and must not be one which the charter or law governing the corporation requires should be made in a particular way or manner. So, also, a corporation may be liable upon a *quantum meruit*, the same as an indi-

vidual, when it has received and used the goods purchased when no statute forbids or limits to a certain method the exercise of its power to make a contract therefor. See the authorities already cited, and, in addition, *McDonald v. New York*, 68 N. Y. 23, 23 Am. Rep. 144; *Wells v. Salina*, 119 N. Y. 280, 7 L. R. A. 759; *Kramath v. Albany*, 127 N. Y. 575. If this principle is applicable to the state, even if a suit to enforce its liability was permissible, the case at bar does not fall within it, for the prescribed mode of contracting for the goods was not observed; and even if contracts of purchase, when made in the prescribed way, are within the scope of the officer's authority, this contract was *ultra vires*, because executed by him in express violation of the law. Being so, it is not susceptible of ratification, no implied liability arises, nor is the state bound upon a *quantum meruit*."

The same effect is the case of *Hinnen v. Newman*, 12 Pac. 144. In that case the Supreme Court of Kansas said:

"The whole transaction between these parties contravenes public policy, and is clearly illegal; and the general rule is that an action founded upon an illegal transaction, where the parties are *in pari delicto*, cannot be maintained. In all such cases the courts refuse to assist the parties to carry out or to reap the fruits of the illegal transaction, but will leave them in the condition in which they were found. In applying this principle, the supreme court of the United States has said: 'The law leaves the parties to such a contract as it found them. If either has sustained a loss by the bad faith of a *particeps criminis*, it is but a just infliction for premeditated and deeply-practiced fraud, which, when detected, deprives him of anticipated profits, and subjects him to unexpected losses. He must not expect that a judicial tribunal will degrade itself, by the exertion of its powers, by shifting the loss from one to the other or equalize the benefits or burdens which may have resulted by the violation of every principle of morals and of laws.' *Bartle v. Coleman*, 4 Pet. 184.

Here both of the parties before the court were directly

concerned in the transaction. Together they secretly conspired to and did commit a wrong against others. The transaction, tainted with illegality, was voluntarily entered into and consummated by them. There was no constraint upon the plaintiff compelling him to carry out the unlawful purpose, nor does any fact appear which affords him any excuse for his misconduct, or that would bring him within any of the exceptions to the rule that has been stated."

And see foot note to case last cited, reading as follows:

"That no action of any character can be maintained to enforce a right growing out of an illegal transaction, see *Feineman v. Sachs*, (Kan.) 7 Pac. Rep. 222; *Bach v. Smith*, (Wash. T.) 3 Pac. Rep. 831; *Mackintosh v. Renton*, Id. 830; *Fisher v. Lord*, (N. H.) 3 Atl. Rep. 927, and note; *Gould v. Kendall*, (Neb.) 19 N. W. Rep. 492; *Clark v. Lincoln Lumber Co.* (Wis.) 18 N. W. Rep. 492; *Gibbs & Sterrett Manuf'g Co. v. Brucker*, 4 Sup. Ct. Rep. 572."

In the case of *Harrison County v. Ogden*, 108 N. W. 451 the Supreme Court of Iowa had under consideration the question of the validity of certain county warrants issued for bridge construction furnished by a member of the board of supervisors in contravention of statute. In that case the suggestion was advanced, as it was advanced in the case at bar in the District Court, that the county by retaining the benefits of the supplies furnished became liable for the value thereof. In that regard the court said:

"It is further said that, even if the transaction falls within the prohibition of the statute, the county has received the benefit of the work, and that it is inequitable and unjust to hold the warrants void. It is a fundamental rule, however, that rights based on the violation of the law will never be enforced by the courts, and this without reference to the wish of either party to the transaction. If the court is advised that the transaction is

illegal because in contravention of a statute making it a criminal offense, it is sufficient to justify a refusal to uphold the transaction in any way."

The case of *Berka v. Woodward*, decided in 1899, and reported in 45 L. R. A. 420, presented the situation of a member of the city council of the city of Santa Rosa having furnished to that city lumber and materials which the city accepted and retained, issuing its warrants therefor to the plaintiff. The defendant, city treasurer, refused to pay such warrants and an action was brought against him. In a most excellently considered opinion by Judge Henshaw it was held that the city could not be compelled to pay for such lumber and materials. In that regard the court said:

"Where contracts of public officials with their counties or municipalities have not been expressly forbidden by law, the principles which we have been considering have in some cases been applied, and a recovery has been permitted. In these cases it has been said that the demands of public policy have been satisfied by allowing the officer to recover, not according to the terms of his contract, but upon a *quantum meruit* or *quantum valebat*. *Spearman v. Texarkana*, 58 Ark. 348, 22 L. R. A. 855; *Pickett v. School Dist. No. 1*, 25 Wis. 551, 3 Am. Rep. 105; *Concordia v. Hagaman*, 1 Kan. App. 35; *Gardner v. Butler*, 30 N. J. Eq. 702; *Call Publishing Co. v. Lincoln*, 29 Neb. 149; *Macon v. Huff*, 60 Ga. 221; *Currie v. School Dist. No. 26*, 35 Minn. 163; *Niles v. Muzzy*, 33 Mich. 61, 20 Am. Rep. 670. But in no one of these cases, nor indeed in any case which has come under our observation, have the courts entertained any contract, or any rights growing out of a contract, where either the consideration is base, or the contract is against the express prohibition of the law. * * * *
This, then, is the undoubted rule, that, when a contract is expressly prohibited by law, no court of justice will entertain an action upon any asserted rights growing out of

it. And the reason is apparent; for to permit this would be for the law to aid in its own undoing. Says the Supreme Court of the United States in *Bank of United States v. Owens*, 2 Pet. 527, 7 L. Ed. 508: 'No court of justice can, in its nature, be made the handmaid of iniquity. Courts are instituted to carry into effect the laws of a country; how can they then become auxiliary to the consummation of violations of law? * * * There can be no civil right where there can be no legal remedy; and there can be no legal remedy for that which is itself illegal.' And again the same august tribunal, in *Coppell v. Hall*, 7 Wall. 542, 19 L. Ed. 244, says: "Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract and void for the same reason. Where the contamination reaches, it destroys. The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded upon its violation.' And in our own state it has been said (*Swanger v. Mayberry*, 59 Cal. 91): 'The general principle is well established that a contract founded on an illegal consideration, or which is made for the purpose of furthering any matter or thing prohibited by statute, or to aid or assist any party therein, is void. This rule applies to every contract which is founded on a transaction *malum in se*, or which is prohibited by a statute on the ground of public policy.' Nor in such cases does it matter whether the contract has been partially or wholly performed, or whether the consideration has passed or not. 'The test,' says Judge Duncan in *Swan v. Scott*, 11 Serg. & R. 164, 'whether a demand connected with an illegal transaction is capable of being enforced at law, is whether the plaintiff requires the aid of the illegal transaction to establish his case. *If the plaintiff cannot open his case without showing that he has broken the law, a court will not assist him, whatever his claims in justice may be upon the defendant.*' And this must be so; for, while, as a matter of private justice between individuals, it would

be but fair that one, under such an illegal contract, should restore the consideration or should make the payment, the rights of the public are superior to any such private considerations, and the public's rights is that the fountains of justice shall remain unpolluted; that no court shall lend its aid to a man who grounds his action upon an immoral or illegal act. Therefore there is no place for equitable considerations, presumptions, or estoppels. *Fowler v. Scully*, 72 Pa. 456, 13 Am. Rep. 699. *Ex turpi causa non oritur actio*. Whenever such a contract comes before the court, the action must fail, and the parties will be left in the situation in which they may be found. Some slight attempt will be found in some of the cases to evade the application of this well-settled doctrine upon the ground of the hardship which sometimes results, but in no case, we think, has the existence of the rule been denied, or its justice as a matter commanding public necessity been questioned." (Italics ours.)

In the case at bar not only was it necessary for defendant in error to disclose at the very beginning of its proof that the furnishing of the property sued for was under a contract entered into in violation of law, but such violation is expressly pleaded in the complaint. (Complaint of defendant in error, Printed Transcript pp. 2-3). In addition to which the agreed statement of facts discloses that this property was all delivered under and in pursuance of the terms of this illegal contract of subletting between Weldy and defendant in error and with full knowledge on the part of defendant in error of its legality. (Printed Transcript pp. 30-31-32-33-34). The pertinency therefore to the case at bar of the language just quoted from the opinion in the case of *Berka v. Woodward*, 45 L. R. A. 420, is apparent.

It is true there are cases holding that when a contract is void and not susceptible of enforcement, a recovery can sometimes

be had of money or property parted with thereunder. Some of these cases were cited by counsel for defendant in error in the District Court, and will hereinafter receive more extended consideration. They all proceed upon the distinction which exists between contracts *void* merely because of failure to observe statutory pre-requisites to their execution, and contracts which, like the one under consideration, are *illegal* because in violation of positive law or in contravention of public policy. That this distinction exists, and that it is controlling against defendant in error in the case at bar, cannot admit of doubt. In the first class of cases a recovery is often permitted, especially where the contract has been entered into and partially performed in good faith by both parties; but in the latter class of cases a recovery is uniformly denied. The Supreme Court of Appeals of Virginia had occasion to point out this distinction in the somewhat recent case of *Roller v. Murray*, 72 S. E. 665. In that regard the court said:

“The general rule is that where an agreement is treated as void merely because it is not enforceable, as in cases under the statute of frauds or of parol agreements where the contract is not in writing and money is paid or services are rendered under it by one party and the other avoids it, there can be a recovery upon an implied assumpsit for the money paid or the value of the services rendered. In such cases there has been the mere omission of a legal formality, and while by the terms of the statute he must lose the benefit of his contract, yet, there being nothing illegal or immoral in it, he is entitled to be compensated for the services rendered under it. * * * On the other hand, it is also well settled, as a general rule, that where the contract is *illegal, because contrary to positive law or against public policy, an action cannot be maintained, either to enforce it directly or to recover the value of services rendered under it, or money paid on it.* * * *

A champertous agreement being unlawful, it would seem clear that compensation for services rendered under it could not be recovered upon a *quantum meruit*, any more than upon the agreement itself, without overturning the very foundations upon which the rule refusing to enforce unlawful agreements is based. Of what value would the rule be, if the courts permit that to be done by indirection which they refuse to allow to be done directly? Why say to the attorney, 'You shall not recover upon the champertous agreement the agreed value of the services rendered by you, but you may recover upon an implied contract (which in fact never existed) the value of such services,' which in this case is claimed and shown to be the same as the agreement provided for? How would any such result uphold the policy of the law, deter others from entering into similar contracts, or promote the public good? To permit a recovery upon *quantum meruit*, instead of discouraging, would encourage, the making of such contracts; for, if the client kept and performed his unlawful agreement, the attorney would get the benefit of it, and if he did not, the attorney would suffer no loss, since he could recover upon the *quantum meruit* all that his services were worth. Any process of reasoning which leads to such a result we think must be unsound." (Italics ours).

The case of *Benson v. Bawden*, 13 L. R. A. (N. S.) 721 presented practically the identical principle involved in the case at bar. There an illegal contract was entered into for fixing the location of a postoffice in a certain building and maintaining the same there for a certain period. Acting under this illegal contract the assignor of plaintiff furnished certain fixtures and property to defendant. The defendant refused to return the property after retaining it under the illegal contract for several years. In holding that there could be no recovery of the value of such property the Supreme Court of Michigan said:

“It is well settled that the law will not aid either party to an illegal agreement. It leaves the parties where it finds them. Neither a court of law nor equity will aid the one in enforcing it, or give damages for the breach of it, or set it aside at the suit of the other, or, when the agreement has been executed in whole or in part by the payment of money or the transfer of other property, lend its aid to recover it back. 9 Cyc. Law & Proc. pp 546 et seq., and cases cited; *Walhier v. Weber*, 142 Mich., and cases cited on page 325, 105 N. W. 773. By this suit plaintiff is, in effect, asking the aid of the court to recover back property parted with under an illegal agreement. She is in no better position than her assignor, and, in asking the court for the value of the property claimed to have been converted, is unable to exhibit her case without presenting to the court the question of the illegality of this contract. * * * These parties are equally in the wrong, and the court will leave them where it finds them.”

This case would seem to dispose of the contention made by counsel for defendant in error in the District Court that a distinction exists between suits to recover when specific property is delivered under an illegal contract, and suits to recover when money is paid thereunder. On principle, the character of the property delivered under an illegal contract cannot be determinative of the existence or non-existence of a cause of action. Nor will a party to such a contract be permitted to recover when the property delivered remains in specie, and denied a recovery when it does not remain in specie, or is of a character that does not admit of segregation. The controlling consideration is not that property in specie has been delivered under the illegal contract, but that the courts will not lend their aid to the circumvention of a statutorily declared public policy by permitting a recovery when any character of property is so delivered.

See also *Chicago I. & L. Ry. Co. v. Southern Indiana Ry. Co.*, 70 N. E. 843 where the Supreme Court of Indiana used the following language:

“The appellant is seeking to enforce a contract illegal in itself. The law will refuse to lend its aid to that end. Executory, it will interfere at the suit of neither party; *executed in whole or in part, it leaves the parties where they have placed themselves.* *Brewing Co. v. Hartman*, 19 Ind. App. 603, 49 N. E. 864; *Woodford v. Hamilton*, 139 Ind. 481, 39 N. E. 47; *Hutchins v. Weldin*, 114 Ind. 80, 15 N. E. 804; *Schmueckle v. Waters*, 125 Ind. 265, 25 N. E. 281.” (Italics ours).

Nor does it militate against the rule laid down by these authorities that the refusal of the courts to grant relief to parties *in pari delicto* in the violation of a statute, will result in one party receiving a benefit for which he renders no equivalent. As was said in the case of *Burck v. Abbott*, 54 S. W. 314:

“Nor does it vary the rule that appellants who invoke the doctrine are equally guilty, and can thus by their unlawful acts obtain an unconscionable advantage. The policy of the law is to discountenance the making of such contracts, and it is thought this can be done in no more effective way than by a refusal to enforce them, and this is done without regard to the effect it may have upon the parties to the prohibited transaction.”

See also *Jourdan v. Burstow*, 74 Atl. 124.

“No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act.”

Pendleton v. Asbury, 78 S. W. 651.

In the case of *Gilchrist v. Hatch*, 100 N. E. 473, decided in 1913, the Supreme Court of Indiana stated the general rule as follows:

“A contract against sound morals or public policy cannot be enforced, and, where it has been wholly or partly

executed, the law will extend no relief, but will leave the parties where they have placed themselves. In such cases the maxim applies, 'In pari delicto portior est conditio de defendentis.' *Hutchins v. Weldin*, 114 Ind. 80, 15 N.E., 804; *Overshiner v. Wisheart*, 59 Ind. 135."

The rule is thus stated in 2 Wils. 341, 1 Smith's Leading Cases (11th Ed.) 371:

"Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of the court to fetch it back again."

The Supreme Court of Oklahoma in the case of *Atchison T. & S. F. Ry Co. v. Holmes*, 90 Pac., 22, quoting with approval from 9 Cyc. 546, said:

"No principle of law is better settled than that a party to an illegal contract cannot come into a court of law and ask to have his illegal objects carried out; nor can he set up a case in which he must necessarily disclose an illegal purpose as the groundwork of his claim. The rule is expressed in the maxims, 'Ex dolo malo non oritur actio' and 'In pari delicto potior est conditio defendentis.' The law, in short, will not aid either party to an illegal agreement. It leaves the parties where it finds them. Therefore neither a court of law nor a court of equity will aid the one in enforcing it, or give damages for a breach of it, or set it aside at the suit of the other, or, when the agreement has been executed in whole or in part by the payment of money or the transfer of other property, lend its aid to recover it back. The object of the rule refusing relief to either party to an illegal contract, where the contract is executed, is not to give validity to the transaction, but to deprive the parties of all right to have either enforcement of, or relief from, the illegal agreement."

Nor is the doctrine announced by these authorities confined to the state courts. It has received the sanction of the Federal Courts as well. The Supreme Court of the United States

in the case of McMullen v. Hoffman, 174 U. S. 639, used the following language:

“The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract. *In case any action is brought in which it is necessary to prove the illegal contract in order to maintain the action, courts will not enforce it, nor will they enforce any alleged rights directly springing from such contract.*” (Italics ours.)

And the same rule is applicable to equity actions as to actions at law. As was said by the Supreme Court of California in the case of Colby v. Title Ins. & Trust Co., 117 Pac. 913:

“It is true that, as a general rule, equity will not aid one party or another to an illegal transaction where they stand in *pari delicto*, but will leave them just where it finds them, to settle these questions without the aid of the court. This rule is universally recognized, and a few of the many authorities announcing it are Pomeroy’s Eq. Jur. (3d Ed.) pp. 659, 667, 1703; Atwood v. Fisk, 101 Mass. 363, 100 Am. Dec. 124; Ager v. Duncan, 50 Cal. 325; Hays v. Windsor, 130 Cal. 230, 62 Pac. 395; Chateau v. Singla, 114 Cal. 91, 45 Pac. 1015, 33 L. R. A. 750, 55 Am. St. Rep. 63, cited by respondent.”

The following cases also sustain the doctrine contended for:

Vandegrift v. Vandegrift, 75 Atl. 365.

Brown v. School District, 10 Atl. 119.

Pittsburgh Const. Co. v. West Side Belt R. Co., 151 Fed. 125.

Dunn v. Stegeman, 101 Pac. 25.

Hanover Nat’l Bank v. Nat’l Bank, 109 Fed. 421.

Butler v. Agnew, 99 Pac. 395.

Moore v. Moore, 62 Pac. 294.

Embry v. Jemison, 131 U. S. 336.

Ray v. Davidson, 111 N. W. 25.

Citizens Nat’l Bank v. Mitchell, 103 Pac. 720.

Alexander v. Barker, 67 Pac. 829.
Howell v. City of Hamburg Co., 131 Pac. 130.
Roy v. Harney & Co., 110 N. W. 106.
City of Pittsburg v. Goshorn, 79 Atl. 505.
Winchester Elec. Light Co. v. Veal, 41 N. E. 334.
Otis v. Freeman, 85 N. E. 168.
Maniscano v. Mayor, 51 So. 608.
Glass v. Childs, 71 S. E. 920.

The principle declared by these authorities has been crystallized into statute in this jurisdiction. Revised Codes of Montana of 1907, Sec. 6192, reads as follows:

“Between those who are equally in the right or equally in the wrong, the law does not interpose.”

And this statute has been construed by the Supreme Court of Montana in the case of Melville v. Butte & Balakava Mining Company, 130 Pac. 441 to mean what it says.

The citation of further authority to sustain the rule contended for would seem to be a work of supererogation. There is a practical unanimity of judicial decision sustaining it. If there are cases holding the contrary they assuredly are, as was said by the Supreme Court of California in the case of *Exparte Drexel*, 82 Pa. 429; “not of sufficient consequence to ruffle the great current of authority which runs the other way.”

The principle upon which these decisions rest is not that one party to the mutual violation of a statute should obtain an advantage over the other, but that the courts will not aid in carrying out transactions between parties which are contrary to public policy. As was said by the Supreme Court of Colorado in the case of *Russel v. Courier Printing & Publishing Co.*, 95 Pac. 936:

“Public policy, with respect to the administration of the law, is that rule of law which declares that no one can

lawfully do that which tends to injure the public, or is detrimental to the public good. 23 Cyc. 455. All contracts contrary to public policy are void. If either party to a contract of that character seeks redress from the other, he will be left by the courts in the position in which he placed himself. It does not sound well for a defendant to say that a contract which he deliberately entered into, and of which he has had the benefit, is void because contrary to public policy; but it is not for his sake, or for his protection, that the objection is allowed, but for the protection of the public, by thus preventing this character of contracts being made, and avoiding evils which naturally result therefrom. *Hope v. Linden Park Ass'n*, 58 N. J. Law, 627, 34 Atl. 1070, 55 Am. St. Rep. 614; *Drake v. Lauer*, 93 App. Div. 86, 86 N. Y. Supp. 986."

In the case at bar the legislative assembly of Montana has declared the public policy of that state relative to contracts for county printing. This Court is not required to speculate whether the particular transaction here drawn in issue is or is not against public policy. The statute has unequivocally resolved that question against the contract under consideration. Defendant in error saw fit to speculate as to whether that legislative declaration of public policy would be upheld by the courts, and having discovered through the medium of the case of *Hershey v. Neilsen*, 47 Mont. 132 that it is upheld, it now asks the aid of this court in recovering what it lost by reason of that speculation. That assistance, it is respectfully submitted, should not, under the authorities cited, be vouchsafed.

II.

THE POSITION OF DEFENDANT IN ERROR IN THE DISTRICT COURT.

Counsel for defendant in error conceded in the District Court, and will doubtless also here concede, the invalidity of

the contract of subletting entered into with Weldy. Indeed the Supreme Court of Montana held such contract invalid in the case of *Hershey v. Neilsen*, 47 Mont. 132, and granted a permanent injunction against carrying out its terms. So far as that is concerned the position of defendant in error in the district Court, frankly was that inasmuch as this contract was illegal, having been entered into a violation of law, no title to the property delivered thereunder passed to Hill County, hence such title having been in defendant in error at the time of the conversion of the property by Hill County, the present action will lie to recover the value thereof. This position carries with it as a necessary corollary, the novel legal proposition that a cause of action in one's favor, which otherwise could not exist, can be created by a violation of law; for if the contract of defendant in error with Weldy had not been entered into in contravention of the statute, and therefore had been valid, the cause of action arising in its favor would have been one for non-payment under the contract and would have been *for the contract price*. Yet because defendant in error saw fit to violate the law, and because, therefore, its contract with Weldy was invalid, it finds itself the possessor of and brings the wholly distinct and different action for a conversion. No such cause of action as this could have arisen if defendant in error had not violated the law; from which it follows, if its position is well founded, that its violation of law created the cause of action. It is respectfully submitted that one cannot create a cause of action in his own favor by the violation of a statute. But without regard to the anomaly above adverted to, the position of defendant in error requires a brief consideration of the nature of the cause of action claimed by it in the case at bar. The com-

plaint in the present action is a somewhat novel document. It first alleges a contract, ostensibly valid, and the delivery to Hill County of certain property thereunder; then avers certain facts which show such contract to be invalid and that Hill County asserts its invalidity and refuses to pay for the property so delivered; then alleges that Hill County, after the delivery of the property, converted the same to its own use and finally charges that at the time of such conversion defendant in error was the owner and entitled to the possession of this property. (Complaint paragraphs IV, V, VI, VII, VIII; Printed Transcript pp. 2 and 3).

It would seem that this complaint by its allegations works its own undoing. If the contract alleged was in fact a contract, then there could have been no conversion; on the other hand if it was no contract because entered into in violation of law, as the complaint practically avers, then there can be no recovery for the value of the property delivered thereunder. Again, if the contract was in fact a contract, then as a matter of law defendant in error was not the owner of the property nor entitled to the possession of the same at any time subsequent to its delivery to Hill County, the averments of the complaint to the contrary notwithstanding. From the averments of the complaint it is evident that defendant in error takes the position that it is entitled to recover in this action for a conversion of its property by Hill County. In other words it is endeavoring to repudiate the illegal contract of subletting with Weldy and base a cause of action on such repudiation. If, however, the action is one for a conversion it necessarily rests upon the implied obligation which arises when one appropriates property belonging to another to pay the reasonable value thereof. But the rule is in-

flexible that no implied contract can arise where any restrictions are imposed by law upon the party sought to be charged, against making in direct terms a similar contract to that implied.

Zottman v. San Francisco, 20 Cal. 96.

Approved in Missoula St. Ry. Co. v. City of Missoula, 47 Mont. 85.

Spitzer v. Blanchard, 46 N. W. 400.

2 Page on Contracts, Sec. 1012.

Macy v. Duluth, 71 N. W. 687.

See also Kramrath v. City of Albany, 28 N. E. 400, in which case the Court of Appeals of New York used the following language:

“That corporations may be bound upon implied contracts made by its agents, and to be deduced from corporate acts without a vote of the governing body, is now well established. Within the practical application of that rule, such contract must be within the scope of the corporate powers, and must not be one which the charter or law governing the corporation requires should be made in a particular way or manner. Dill. Mun. Corp. Secs. 383, 384, and cases cited in note; 2 Kent, Comm. p. 291; Bank v. Patterson, 7 Cranch, 299; Peterson v. Mayor, 17 N. Y. 449; Gas Light Co. v. Mayor, 3 Rob. (N. Y.) 124, affirmed 33 N. Y. 309; Nelson v. Mayor, 63 N. Y. 535; McCloskey v. Mayor, 7 Hun. 472. When the act done is *ultra vires*, it is void, and there can be no ratification, and, when the mode of contracting is limited and provided for by statute, an implied contract cannot be raised.”

To the same effect is the case of Capital Bank of St. Paul v. School District No. 53, 48 N. W. 363 where the Supreme Court of North Dakota said:

“The contract out of which the warrants grew was not merely beyond the power of the corporation; it was prohibited by the spirit and policy of the law. An express

prohibition would not, as we construe the statute, add any strength to this view of the case. The law will not imply a promise to pay against its own prohibitions, nor will the courts suffer a policy once declared to be defeated by the receipt of the benefits of a contract which that policy condemns."

Inasmuch therefore, as it is conceded by defendant in error that its direct contract for the delivery of this property was invalid, under the authorities cited no implied promise to pay arose out of the transaction which would permit a recovery.

It is only fair to defendant in error to say that its contention in the District Court was that it was not seeking the enforcement of this contract of subletting with Weldy. It there declared itself as expressly disaffirming the contract, as its counsel stated in their brief, "for the purpose of undoing what was done in violation of law." Notwithstanding these fair words plaintiff is in reality seeking in the present proceeding to accomplish the enforcement of its illegal contract of subletting with Weldy. This is so because inasmuch as it will be presumed defendant in error agreed to furnish these printed supplies under its contract at their value, to permit a recovery of their reasonable value would be in effect a carrying out of that contract according to its precise terms. It would be accomplishing by indirection something defendant in error cannot accomplish directly. It is apparent that there is no difference between enforcing this illegal contract according to its terms and a so-called disaffirmance of it and requiring plaintiff in error to pay the reasonable value of the printed supplies delivered under its terms. "Things equal to the same thing are equal to each other." It seems hardly necessary to add that if defendant in error can prevail in this action, the statute prohibit-

ing counties contracting for county printing with printing establishments outside the state is wholly emasculated. All that such non-resident concern need to do is to enter into a contract in violation of the statute, furnish printing supplies thereunder, and then blandly insist that the contract is invalid but that nevertheless it is entitled to recover the value of the supplies so furnished. It is most respectfully submitted that the courts should not assist in this subterranean method of circumventing the legislative will.

Additionally it is a matter of grave doubt whether defendant in error possesses any right to disaffirm a contract which never at any time possessed any validity, and which in any event is no longer as to it in any respect executory. Having as fully executed such illegal contract as it is possible for it to do, defendant in error has placed the same beyond its power to disaffirm.

But without regard to the foregoing it is respectfully submitted that defendant in error cannot alter its position to its advantage by evincing a present desire to disaffirm a contract entered into in violation of law under which it has done every act possible to effectuate such violation. So far as defendant in error is concerned the day of repentance has passed.

Counsel for defendant in error contended in the District Court that inasmuch as section 2897 of the Revised Codes of Montana does not prescribe a penalty for its violation, it would be "imposing a penalty which the legislature did not see fit to provide" if the court should deny a recovery in the case at bar. It is true that this statute does not prescribe a penalty to be visited upon boards of county commissioners for entering into contracts in violation of its terms, nor does it in terms provide

that such contracts are invalid. Even so, there is no merit in the suggestion adverted to. When a contract is entered into in violation of the terms of a statute it follows as a matter of law that the same is invalid and unenforcible. The Supreme Court of Montana so held as to this particular contract in *Hershey v. Neilson*, 47 Mont., 132. It likewise follows as a matter of law, under the principle announced by the authorities cited, *supra*, that the parties to such an illegal contract will be left by the courts in the situation in which they are found, so far as the recovery back by one from the other of anything of value parted with thereunder is concerned. It is not essential that the statute provide in terms for these ensuing consequences. Indeed, if this statute had denounced a penalty against boards of county commissioners for violating its terms, we would beyond doubt be confronted by the suggestion from defendant in error that this penalty is exclusive in character.

III.

AUTHORITIES RELIED ON BY DEFENDANT IN ERROR IN THE DISTRICT COURT.

Inasumch as the District Court in rendering its opinion in the case at bar in favor of defendant in error refers to the case of *Morse v. Granite County*, 19 Mont., 450, and states that said case is the same in principle as the case under consideration, "and is conclusive of plaintiff's right to recover," a brief analysis of that case, and others relied upon by defendant in error in the District Court, may not be wholly unprofitable.

In the case of *Morse v. Granite County*, *supra*, the facts were that one Cain, in violation of a statutory prohibition, assumed to sell to Granite County certain supplies when he was

a member of the board of county commissioners of that county. Upon proceedings had in that behalf, by a taxpayer, this contract was adjudged to be wholly void, and thereupon Cain transferred said property to one Morse, and Morse transferred the same to Granite County. Morse was statutorily qualified to contract with the county, and the only question, therefore, for determination in that case was whether after the adjudication against the validity of his contract with the county, title to the property theretofore assumed to be sold to it remained in Cain so he could transfer it to another person. The Supreme Court of Montana properly held that this so-called sale being void, title did not pass thereunder, and that Cain was still the owner of the property and could transfer the same. This was the only question necessary for decision, and the only question decided in *Morse v. Granite County*. It is true enough that the Supreme Court of Montana in the course of its opinion in that case used the following language:

“If, after such adjudication by the district court, the county kept possession of the property, and appropriated it to its use, it could not avoid paying the reasonable value thereof, because the contract by which it obtained it was *ultra vires*, illegal, and void.”

The most casual reading, however, of the facts in that case makes it evident that this language is wholly *obiter dictum*. No question of the right of Cain to recover the value of this property from Granite County arose or could arise in an action by Morse to recover the value thereof; nor was it necessary, nor could it by any possibility be necessary, for the court to determine in an action brought by Morse what the rights of Cain might be in a direct action by him to recover the value of this property from Granite County. But, if the language

quoted could be said to be a substantive portion of the real adjudication in that case, it is amply demonstrable that the Supreme Court of Montana did not intend thereby to indicate that Cain could recover the value of such property from the county in a suit in which he must disclose his own violation of law in order to state a cause of action. The syllabus to that case reads as follows:

“Where the sale of goods by a county commissioner to the county is declared to be void, under a statute, the title to the goods remains in the vendor; he may sell them, and *his vendee may sell them to the county and recover the reasonable value thereof.*” (Italics ours).

This is sound law, and it rests upon the principle that as between Morse and the county a wholly valid and statutorily authorized contract could be entered into, which contract would be, of course, susceptible of enforcement against the county. But if Cain had sued for the value of the property a wholly different situation would be presented and a wholly different principle of law involved. In that case Cain would be in the position of attempting to recover a loss sustained by his own violation of law, and under the authorities heretofore cited in this brief the courts would afford him no relief.

Again, the court in the course of the opinion in *Morse v. Granite County* cites with approval and as sustaining the doctrine claimed by defendant in error to be announced by the language above quoted, the case of *State v. Dickerman*, 16 Mont., 278. An examination of that case, therefore, may shed light upon what the court intended to really hold in the case of *Morse v. Granite County*. The case of *State v. Dickerman* presented the situation of a school district which had issued and sold certain of its bonds concerning the validity

of which there existed some question. Pending litigation to determine such question of validity the school district secured from the purchaser of the bonds an advancement of \$20,000.00 on the purchase price. Subsequently the bonds were declared invalid, and the purchaser brought suit against the school district to recover the \$20,000.00 so advanced. In and about the issuing and sale of the bonds and the securing of the advancement of \$20,000.00 on the purchase price thereof the school district acted in good faith and in the belief that the bonds were valid. As was said in the course of the opinion:

“The most, we think, that can be said in this case, is that there was an imperfect or defective attempt to comply with the law on the part of the trustees in the issuing of the bonds of the district. They had authority under the law to issue them for the purpose for which they were issued, but failed to give a sufficient notice of the purpose and conditions thereof in providing for the election to authorize their issuance.”

Concerning the point under consideration and quoting with approval from the case of *Brown v. City of Atchison*, 17 Pac. 465, the court further said:

“Where a contract has been entered into in *good faith* between a corporation, public or private, and an individual person, and the contract is void in whole or in part, because of a want of power on the part of the corporation to make it or enter into it in the manner in which the corporation enters into it, but the contract is not immoral, inequitable, or unjust, and the contract is performed in whole or in part by and on the part of one of the parties, and the other party receives benefits by reason of such performance over and above any equivalent rendered in return, *and these benefits are such as one party may lawfully render and the other party lawfully receive*, the party receiving such benefits will be required to do equity towards the other party, by either rescinding the contract

and placing the other party in *statu quo*, or by accounting to the other party for all benefits received for which no equivalent has been rendered in return.” (Italics ours).

This is tantamount to holding that it is a condition prerequisite to a recovery in cases of this kind that the benefits received are such as one party may *lawfully render* and the other party *lawfully receive*. Section 2897 of the Revised Codes of Montana having made it unlawful for counties to contract for county printing with a printing establishment outside of the state, printing supplies delivered under such an illegal contract are neither benefits which such printing establishment could *lawfully render* or Hill County *lawfully receive*. In addition to which it is to be observed that the case of *State v. Dickerman* falls within that class of cases where merely some antecedent statutory prerequisite to the entering into of a valid contract has been omitted, and hence, as pointed out in subdivision I of this brief falls within a wholly different legal principle than the case at bar where the entire transaction was in knowing violation of express statutory enactment declaring the public policy of the state relative to contracts for county printing. In *State v. Dickerman* the contract was at the most *void* because of lack of statutory authority to enter into the same in the manner adopted; in the case at bar the contract was *illegal* because entered into in contravention of statute law directed against any contract for county printing with a printing establishment outside the state.

If the Supreme Court of Montana in the case of *Morse v. Granite County*, *supra*, intended to declare that one party to a contract, illegal because prohibited by law, can notwithstanding such illegality recover whatever of value he parts with thereunder it assuredly was most unfortunate in citing *State v.*

Dickerman, *supra*, to sustain that view. The fact that the case of State v. Dickerman, so cited by it, does not sustain that view, seems very persuasive evidence that it was not intended that any such meaning as that claimed by defendant in error should be attached to the language used in Morse v. Granite County.

Counsel for defendant in error also cited in the District Court the case of Missoula Street Railway Company v. City of Missoula, 47 Mont. 85, and insisted that the following excerpt from the opinion sustains its contention in the case at bar:

“It may well be said that, in cases in which the municipality has acquired property which is still in specie, it may not be allowed to retain it and at the same time refuse to pay its reasonable value. In such a case, however, its liability would rest upon different principles. The contract being void, the title to the property would not vest under it, and the seller would be in a position to reclaim it, or, if restoration of it should be refused, to recover the reasonable value of it. But even in such a case the liability would not arise out of the contract.”

In that case the action by the street railway company was upon certain contracts entered into by the city without compliance with certain statutory conditions precedent; and notwithstanding the fact that it was conceded that the city had received benefits aggregating \$5,507.13 from the plaintiff thereunder, a recovery was denied. Here was a direct action by one of the parties to the void contract; and here was an excellent opportunity for the Supreme Court of Montana to hold, in conformity with what defendant in error claims was theretofore held in the cases of Morse v. Granite County, *supra*, and State v. Dickerman, *supra*, that one who is a party to such a void contract can recover whatever of value he parts with thereunder. But singularly enough the court held nothing of the

kind, but did hold that there could be no recovery, basing its decision upon the principle that the plaintiff knew when he entered into the contract and when expending moneys thereunder that the same was illegal; and upon the additional ground that to permit a recovery would be to remove the statutory limitation upon municipalities relative to their right to contract and permit them to do indirectly what they could not do directly. In that regard the court said:

"In support of their last contention, counsel for plaintiff cite several cases which, in effect, hold that it is only when the subject matter of the contract is entirely outside of the scope of the corporate powers, or the contract is clearly prohibited, that the municipality will be permitted to escape liability; and they insist that notwithstanding the contracts in question are void, the plaintiff upon equitable grounds ought to be permitted to recover the reasonable value of such benefits as have been received by the defendant. As already observed, the complaint declares upon the contracts according to their express terms. It is therefore doubtful whether its allegation are sufficient to support a judgment for the reasonable value of the work done. But assuming that they are sufficient, still we do not think the plaintiff entitled to recover. The result of such a holding would establish a rule which would abolish completely all limitation upon the power of the council to bind the city, and thus defeat the very purpose had in view by the legislature in enacting the statute, viz., to promote economy and to protect the taxpayers from fraud and favoritism on the part of the council or the officers of the city. The equitable doctrine of estoppel can have no application to such a case. In entering into the contracts, the plaintiff was dealing with an artificial person, a creature of the law, whose authority to contract is conferred and limited by law. The facts were all known to it. There was no misrepresentation made to it. It knew the extent of the power of the council and how it must be exercised. It dealt with the council at its own

peril. (*Lebcher v. Board of Commissioners, supra*; *State ex rel. Stuerve v. Hindson*, 44 Mont. 429, 120 Pac. 485; *State ex rel. Lambert v. Coad, supra*). If, when it began to work, the contracts were illegal, it knew it. It did the work with full knowledge of this fact. It was therefore not misled, and is not now in a position to allege that the defendant is estopped to question its own liability.

In *Zottman v. San Francisco*, 20 Cal. 96, 81 Am. Dec. 96, in considering the question involved here, Mr. Justice Field said: "To the application of the doctrine of liability upon an implied contract, where work is performed by one, the benefit of which is received by another, there must not only be no restrictions imposed by the law upon the party sought to be charged against making, in direct terms, a similar contract to that which is implied, but the party must also be in a situation where he is entirely free to elect whether he will or will not accept of the work, and where such election will or may influence the conduct of the other party with reference to the work itself. The mere retention and use of the benefit resulting from the work, where no such power or freedom of election exists, or where the election cannot influence the conduct of the other party with reference to the work performed, does not constitute such evidence of acceptance that the law will imply therefrom a promise of payment."

This language is most significant, for it recognizes the distinction contended for by plaintiff in error between contracts, such as the one at bar, entirely outside the scope of the corporate powers of Hill County because prohibited by statute, and contracts within the scope of corporate powers but entered into without observance of the statutory method of execution. In the first class of cases, such as the one at bar, the court appears to consider it not open to controversy that there can never be a recovery; and then holds that even in the second class of cases, under the facts in the case then under consideration, there can likewise be no recovery. Counsel for the street railway com-

pany in that case admitted in their brief that there can be no recovery of money or property parted with in cases where there is an express prohibition against entering into the contract under which the money is paid or the property delivered. The following language from such brief found on page 88 of the reported decision in the case of Missoula Street Railway Co. v Missoula, 47 Mont., 85 indicates this concession:

“Where a municipal corporation receives and retains substantial benefits under contract which it is authorized to make but which is void because irregularly executed, *or which it is not prohibited from making by a positive prohibition*, it is liable in an action brought to recover a reasonable value of the benefits received.” (Italics ours).

The decision in Missoula Street Railway Company v. Missoula, *supra*, is the latest expression of the Supreme Court of Montana upon the subject under consideration. If the language contained therein, and insisted upon by defendant in error as sustaining its position in the case at bar, be given its widest scope it amounts to no more than a holding that where property delivered under a void contract to a municipality remains in specie such municipality will be required to either return it or pay its reasonable value. As indicated in a previous portion of this brief, there is no principle of law to sustain the doctrine that the character of the property delivered is determinative of the existence or non-existence of a cause of action; but assuming it to be the rule, it has no applicability to the case at bar. By the allegations of the complaint it is disclosed that all the property delivered to Hill County by defendant in error has been converted to the uses of such county. Nowhere does it appear that it would be possible for Hill County to return such property or any substantial portion there-

of. Indeed the truth is that all of it has been used by Hill County. Of what pertinency, therefore, to the case at bar is the rule, if it be a rule of law, that property "which is still in specie" will be required to be returned or its value paid?

Counsel for defendant in error also cited in the District Court the case of *Chapman v. County of Douglas*, 107 U. S. 348, as sustaining their contention in the case at bar. That case is not an authority for the proposition to which it is cited, as the following language contained therein and quoted from *Morville v. American Tract Society*, 123 Mass. 129 amply demonstrates:

"The money of the plaintiff was taken and is still held by the defendant under an agreement which it is contended it had no power to make, and which, if it had power to make, it has wholly failed on its part to perform. It was money of the plaintiff, now in the possession of the defendant, which in equity and good conscience it ought to pay over, and which may be recovered in an action for money had and received. *The illegality is not that which arises where the contract is in violation of public policy or of sound morals, and under which the law will give no aid to either party. The plaintiff himself is chargeable with no illegal act, and the corporation is the only one at fault in exceeding its corporate powers by making the express contract.*" (Italics ours).

Counsel for defendant in error also cited in the District Court the case of *Parkersburg v. Brown*, 106 U. S. 487. That case presented an entirely different state of facts than the case at bar. There certain city bonds had been issued to assist the O'Briens in establishing a manufacturing plant within the city of Parkersburg. To guarantee the payment of the interest on such bonds and provide a sinking fund to eventually pay the principal, the O'Briens were required to execute a mortgage or deed of trust covering real estate of sufficient value to

accomplish such guarantee Bonds in the amount of \$20,000.00 were issued to the O'Briens after certain real estate had been conveyed by them to the city in trust for the purpose indicated. Thereafter such bonds passed into the hands of *bona fide* purchasers for value, whereupon the city took the position that the bonds were invalid, having been issued in excess of the authority of the city and refused to pay any interest falling due thereon. A suit being brought by the *bona fide* third party holders of the bonds, the Supreme Court of the United States held that the bondholders were in equity entitled to have the trust properly applied to the payment of the bonds. As stated in the course of the opinion, "there was no illegality in the mere putting of the property in the hands of the city by the O'Briens." In the case at bar there was an illegality consisting of a plain violation of a statute of this state by defendant in error in putting the supplies furnished by it into the hands of Hill County. This distinction in the facts necessarily works a distinction in the legal principle applicable to that case and the case at bar.

Again, in the course of the opinion in the Parkersburg case it is said:

"To deny a remedy to reclaim it (the trust property) it to give effect to the illegal contract."

In the case at bar to permit a recovery by defendant in error would be, as is indicated in subdivision II of this brief, to give effect to the illegal contract, in that thereby such contract will be as effectually carried out as if its precise terms were observed

Again, in the Parkersburg case the court said:

"The property was transferred under a contract which was merely *malum prohibitum*, and where the city was the *principal offender*." (Italics ours.)

In the case at bar the property was delivered by defendant in error in contravention of express statutory prohibition and where it was the principal if not the only offender. The Parkersburg case additionally was an action in equity. It would have been highly inequitable that the innocent *bona fide* holders of the bonds of the city should suffer the loss of the money paid by them for such bonds while the city retained the trust property conveyed for the express purpose of paying the same. The case at bar is an action at law.

To sustain the doctrine claimed by counsel for defendant in error to be announced in the Parkersburg case only three cases are cited in the opinion. The first, that of *White v. Franklin Bank*, 22 Pick. (Mass.) 181 contains the following language quoted from an opinion by Lord Mansfield in *Smith v. Bromley*, 2 Dougl. 696:

“If the act is in itself immoral, or a *violation of the general laws of public policy*, there the party paying shall not have his action; for where both parties are equally criminal against such general laws, the rule is *prior est conditio defendantis*.”

This would seem to suffice as a comment upon that case as an authority in favor of defendant in error.

The second case cited in *Parkersburg v. Brown* is that of *Morville v. American Trust Society*, 123 Mass. 129, and, as indicated by the quotation therefrom hereinbefore set out, that case holds directly against the contention of defendant in error.

The third case cited in the Parkersburg case is that of *Davis v. Old Colony Railroad*, 131 Mass. 258. That case merely holds that a subscription by a railroad corporation to a fund for the holding of a musical jubilee is void and unenforcible. This would seem to be sound law, but hardly in point on the proposition to which it is cited.

Another case cited by the defendant in error in the District Court is that of Butts County v. Jackson Banking Co., (Ga.) 15 L. R. A. (N. S.) 567. This was an equitable action wherein the Jackson Banking Company sued on certain promissory notes evidencing certain loans made to the county and used in taking up valid county warrants issued to pay current expenses. There existed a constitutional prohibition against counties borrowing money, and the court held that the notes were void, but that the Banking Company was entitled to be subrogated to the rights of the holders of the warrants paid by its moneys, which warrants were valid obligations of the county, and therefore that it could recover. In other words, the Banking Company by virtue of these loans which were applied to the liquidation of valid outstanding obligations, while it could not recover on its notes, became equitably subrogated to the rights of the holders of these obligations, and therefore could maintain an action against the county founded thereon. This accounts for the language contained in the opinion in that case to the effect that moneys secured by a municipality in violation of a statutory or constitutional provision if applied to the payment of legal and valid claims against such municipality can be recovered, while if applied to the payment of obligations which the municipality is prohibited by law from incurring, there can be no recovery. Cursorily considered there would seem to be no valid reason for recognizing a cause of action against a county merely because it expends moneys received by it in liquidating *valid* obligations, and denying a recovery when the application is to *invalid* obligations. But when it is considered that the ground of the distinction is the doctrine of subrogation to the rights of the holder of the obligation liquidated, the reason for the distinction becomes at once apparent.

But of what application to the instant case is this doctrine of equitable subrogation? To whose valid and subsisting claim against Hill County did defendant in error become subrogated by furnishing printing supplies to that county under an illegal contract? To the discharge of what valid claim against Hill County were the printing supplies furnished by defendant in error applied? To ask these questions is to answer them. There is not and cannot be any doctrine of subrogation in the case at bar, and the authority cited sustains in no respect the right of defendant in error to recover therein.

The only remaining case cited by defendant in error in the District Court is that of *Brown v. City of Atchison (Kan.)* 17 Pac. 465. This is a case cited and quoted from with approval by the Supreme Court of Montana in the case of *State v. Dickerman, supra*. As indicated by that quotation, which is contained in a previous portion of this brief, that decision is unequivocally against the principle contended for by defendant in error. The holding there was that if the benefit received under a void contract is one that could be lawfully rendered and lawfully received, and the parties have acted in good faith, a recovery can be had. It scarcely needs to be repeated that this is tantamount to holding that if the benefit is one which is prohibited by law from being either rendered or received, as in the case at bar, no recovery can be had.

We respectfully submit that this judgment should be reversed.

C. A. SPAULDING,

L. V. BEAULIEU,

For Plaintiff in Error.



United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HILL COUNTY,

Plaintiff in Error,

v.

SHAW & BORDEN COMPANY,

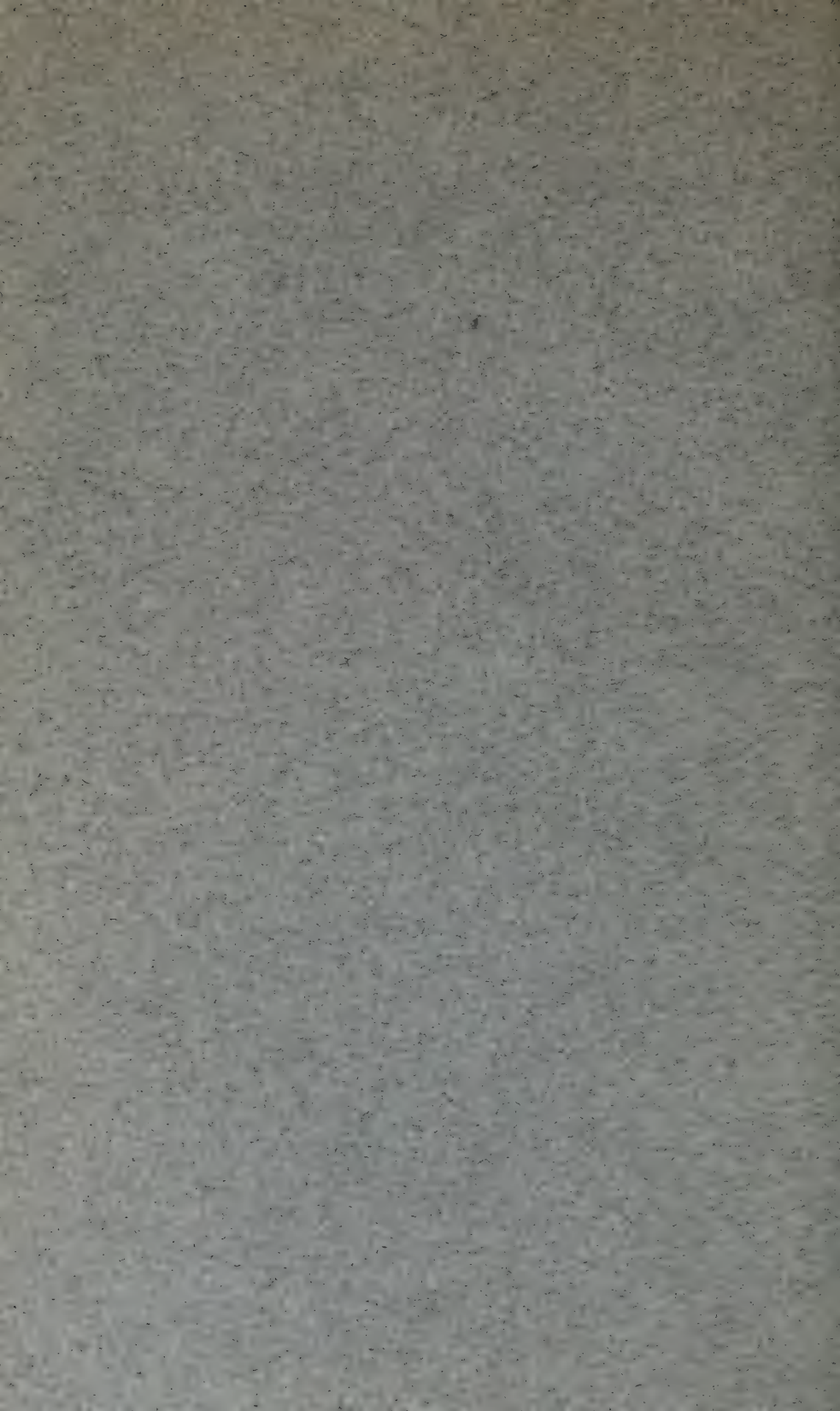
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

JOHN B. CLAYBERG,

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Attorneys for Defendant in Error.



UNITED STATES CIRCUIT COURT OF APPEALS, FOR
THE FIFTH CIRCUIT.

HILL COUNTY,)
Plaintiff in Error.)
vs.)
SHAW & BORDEN COMPANY,)
Defendant in Error.)

In behalf of defendant in error, we desire
to have the following cases inserted in our brief.

His title passed by the void contract,
even though the property was delivered to
plaintiff in error thereunder.

DUNLOP vs. MERCER, 156 Fed., 545
TATE vs. CAIRNS, 105 Pac., 193

The doctrine of the Supreme Court of
the United States, as announced in brief
for defendant in error, is confirmed in
the following cases.

LOGAN COUNTY BANK vs. TOWNSHIP, 139 U.S., 67
CENTRAL BANK vs. APPLETON, 216 U.S., 196
HANKIN vs. SMITH, 218 U.S., 27

JOHN E. CLAIRBORO,
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Attorneys for Defendant in Error.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HILL COUNTY,

Plaintiff in Error,

v.

SHAW & BORDEN COMPANY,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

In this case it appears from the agreed statement of facts that Hill County entered into a contract with one B. B. Weldy by which Weldy agreed to sell and deliver certain personal property to said county and to do certain printing. It further appears that Weldy sublet a portion of this contract to the defendant in error, and that thereupon the defendant in error furnished and delivered to the plaintiff in

error the items of property described in exhibit "A" to the complaint. A taxpayer obtained an injunction, enjoining the county from paying any claim of the said Weldy for the said property. The injunction was granted for the reason that the subletting of said contract by said Weldy to defendant in error was in violation of section 2897 of the Revised Codes of Montana. Defendant in error demanded a return of the property or payment of the value thereof. The demand was refused and thereupon this action to recover for the conversion of said property was instituted.

The demand for the return of the property and the action for the conversion thereof are in disaffirmance of the contract. Furthermore as the contract was illegal, the title to the property did not pass from defendant in error. In view of these considerations the plaintiff in error is liable for a conversion of the property. The right of recovery under the circumstances is sustained by decisions of the Supreme Court of the United States and decisions of the Supreme Court of Montana as well, to which reference will be made.

In the case of *Morse v. Granite County*, 19 Mont. 450, it appeared that one Cain, a county commissioner of Granite County, sold certain property to the county. He presented a claim to the county for the value of the property, which was allowed. A taxpayer appealed to the District Court from the allowance of the claim and the court disallowed the claim for

the reason that the contract of sale was illegal by virtue of section 1110 of the Fifth Division of the Compiled Statutes of Montana of 1887, which prohibited a county commissioner from selling property to the county of which he was a commissioner. Cain then sold the property to the plaintiff Morse and Morse sold the property to the county. The action was for the recovery of the value of the property. The court in the opinion said:

“Now, without commenting on this statute, let us inquire what was the effect of the judgment of the district court in holding and adjudicating Cain’s claims against the county for this property ‘illegal and void.’ Counsel for respondent say that, by such adjudication, the property became the property of the county, and that thereafter Cain had no authority to sell it to Morse or any one else. *The district court held the contract of sale of the property between Cain and the county to be void, because prohibited by statute. This left the title to the property still in Cain. The court did not and could not, by such adjudication, confiscate Cain’s property.* If, after such adjudication by the district court, the county kept possession of the property, and appropriated it to its use, it could not avoid paying the reasonable value thereof, because the contract by which it obtained it was *ultra vires*, illegal, and void. This question is fully discussed by this court in *State ex rel., etc., v. Dickerman*, 16 Mont. 278, 40 Pac. 698.” (Italics ours.)

In the brief for plaintiff in error an attempt is made to distinguish this case from the case before the court. It is said:

“No question of the right of Cain to recover the value of this property from Granite County arose, or could arise, in an action by Morse to recover the value thereof; nor was it necessary, nor could it by any possibility be necessary, for the court to determine in an action brought by Morse what the rights of Cain might be in a direct action by him to recover the value of his property from Granite County.”

As shown by that part of the opinion quoted, the contention was made in behalf of the county that the property at the time of the sale to Morse was not the property of Cain but belonged to the county. This was the sole defense in the action. The court, however, decided against this contention. It follows, as a matter of course, that Cain could have maintained an action against the county for the recovery of the property, or its value, or otherwise he could not have made the sale to Morse. In other words, unless Cain had title and a right of action against the county for the recovery of the property, or its value, the sale to Morse could not have placed Morse in a position where he could sell to the county. We submit that there is no distinction in principle between the case of *Morse v. Granite County* and the case before the court.

In the case of *Missoula Street Railway Company v. City of Missoula*, 47 Mont. 85, which involved a contract with a municipality, made in violation of a statute, requiring advertisement and the letting of the contract to the lowest responsible bidder, the court said:

“It may well be said that, in cases in which the municipality has acquired property which is still in specie, it may not be allowed to retain it and at the same time refuse to pay its reasonable value. In such a case, however, its liability would rest upon different principles. The contract being void, the title to the property would not vest under it, and the seller would be in a position to reclaim it, or, if restoration of it should be refused, to recover reasonable value of it. But even in such a case the liability would not arise out of the contract.”

In the case of *Chapman v. Board of County Commissioners of Douglas County*, 107 U. S. 348, land had been conveyed to a county for a poor house pursuant to an agreement which, in its provisions relating to the time and mode of payment, was in excess of the authority of the county. The suit was for the purpose of recovering possession of the land and obtaining a reconveyance of the title. The court in the opinion said:

“As the agreement between the parties has failed by reason of the legal disability of the county to perform its part, according to its conditions, the right of the vendor to rescind the contract and to a restitution of his title would seem to be as clear as it would be just, unless some valid reason to the contrary can be shown. As was said by this court in *Marsh v. Fulton Co.*, 10 Wall. 676-684, and repeated in *La. v. Wood*, 102 U. S. 294-299, ‘The obligation to do justice rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or com-

pensation.' And see, also, *Miltenberger v. Cooke*, 18 Wall. 421. The illegality in the contract related, not to its substance, but only to a specific mode of performance, and does not bring it within that class mentioned by Mr. Justice Bradley in *Thomas v. Richmond*, 12 Wall. 349-356. The purchase itself, as we have seen, was expressly authorized. The agreement for definite times of payment and for security alone was not authorized. It was not illegal in the sense of being prohibited as an offense; the power in that form was simply withheld. The policy of the law extends no further than merely to defeat what it does not permit, and imposes upon the parties no penalty. It thus falls within the rule, as stated by Mr. Pollock, in his *Principles of Contract*, 264: 'When no penalty is imposed, and the intention of the Legislature appears to be, simply, that the agreement is not to be enforced, then neither the agreement itself nor the performance of it is to be treated as unlawful for any other purpose.' "

In the case of *Parkersburg v. Brown*, 106 U. S. 487, which involved the right to recover property or its value from a city which had received same pursuant to an illegal contract, the court in the opinion said:

"The enforcement of such right is not in affirmance of the illegal contract, but is in disaffirmance of it, and seeks to prevent the City from retaining the benefit which it has derived from the unlawful act. 2 *Com. Cont.* 109. There was no illegality in the mere putting of the property by the O'Briens in the hands of the City. To deny a remedy to reclaim it, is to give effect to the illegal contract. The illegality of that contract does not arise from any moral

turpitude. The property was transferred under a contract which was merely *malum prohibitum*, and where the City was the principal offender. In such a case the party receiving may be made to refund to the person from whom it has received property for the unauthorized purpose, the value of that which it has actually received."

In the case of *Pullman's Palace Car Co. vs. Central Transportation Co.*, 171 U. S. 138, the court said:

"But in the case of this lease, now before the court, a recovery of the rent due thereunder was denied the lessor, although the lessee had enjoyed the possession of the property in accordance with the terms of the lease. It was said (page 60 of the report in 139 U. S., 35-69): 'The courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties so far as could be done consistently with adherence to law by permitting property or money parted with on the faith of the unlawful contract to be recovered back or compensation to be made for it. In such case, however, the action is not maintained upon the unlawful contract nor according to its terms, but on an implied contract of the defendant to return, or failing to do that, to make compensation for the property or money which it had no right to retain. To maintain such an action was not to affirm, but disaffirm, the unlawful contract.' And the opinion of the court ended with the statement that 'Whether this plaintiff could maintain any action against this defendant, in the nature of a *quantum meruit*, or otherwise, independently of the contract, need not be considered, because it is not presented by this record and has not been argued. This action, according to the declaration and evidence,

was brought and prosecuted for the single purpose of recovering sums which the defendant had agreed to pay by the unlawful contract, and which, for the reasons and upon the authorities above stated, the defendant was not liable for.'

"The principle is not new; but, on the contrary, it has been frequently announced, commencing in cases considerably over a hundred years old. It was said by Lord Mansfield in *Holman v. Johnson*, 1 Cowp. 341, decided in 1775, that 'the objection that a contract is immoral or illegal as between the plaintiff and defendant sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say: *Ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act.'

"The cases upholding this doctrine are numerous and emphatic. Indeed, there is really no dispute concerning it, but the matter of controversy in this case is as to the extent to which the doctrine should be applied to the facts herein. Many of these cases are referred to and commented upon in the opinion delivered in the case in 139 U. S. 24, already cited. The right to a recovery of the property transferred under an illegal contract is founded upon the implied promise to return or make compensation for it. For illustrations of the general doctrine as applied to particular facts we refer in the margin to a few of the multitude of cases upon the subject.

"They are substantially unanimous in expressing the view that in no way and in no channels, directly or indirectly, will the courts allow an action to be maintained for the recovery of prop-

erty delivered under an illegal contract where, in order to maintain such recovery, it is necessary to have recourse to that contract. The right of recovery must rest upon a disaffirmance of the contract, and it is permitted only because of the desire of courts to do justice as far as possible to the party who has made payment or delivered property under a void agreement, and which in justice he ought to recover. But courts will not in such endeavor permit any recovery which will weaken the rule founded upon the principles of public policy already noticed."

In the case of *Pelosi v. Bugbee*, 105 N. E. (Mass.) 222, the court in the opinion said:

"The plaintiff in the case at bar, however, is not seeking to enforce any rights under the illegal contract made with Tedesco, but seeks to recover the value of the ring, to which he claims title and which has been converted by the defendant. The agreement between the plaintiff and Tedesco provided that the title to the ring should remain in the plaintiff until paid for, and while this agreement was void and would not be enforced by either party to it because of its illegality, yet the title to the ring was not changed thereby. It still remained in the plaintiff, whose title was not affected by the delivery of possession thereof to Tedesco. The plaintiff's general property in the ring did not arise from the illegal contract, nor was it determined by it. This action is based upon the conversion by the defendant of the plaintiff's property and is wholly independent of the contract between the plaintiff and Tedesco. It is true that the delivery of possession of the ring to Tedesco was under an unlawful agreement which could not be enforced, yet that fact does not affect the liability of the defendant for his wrongful act in converting to his use the

plaintiff's property. This distinction is recognized in *Hall v. Corcoran*, 107 Mass. 251, 9 Am. Rep. 30. It is clear upon principle and authority that while the plaintiff cannot enforce the illegal contract, he may maintain an action for conversion."

See also:

Butts County v. Jackson Banking Co., 15 L. R. A. (N. S.) 567 and note.

State v. Dickerman, 16 Mont. 278.

Brown v. City of Atchison (Kans.), 17 Pac. 465.

White v. Bank, 39 Mass. 181.

Urwan v. Insurance Co., 103 N. W. 1102.

In the opinion in the case of *National Bank & Loan Co. v. Petrie*, 189 U. S. 423, the court said:

"Cases where the action is on the illegal contract do not apply. Such was *First Nat. Bank v. Hoch*, 89 Pa. 324, 33 Am. Rep. 769. Here the attempt is to recover outside of it, treating it as set aside. * * *

"But when a right is claimed to repudiate it, the party who denies the right is the one who relies upon the contract, and that party must take it as it was made."

In the case before the court the defendant in error repudiates the contract. The action is in disaffirmance of the contract. As title to the property did not pass to the county by virtue of the contract, the title is, and always has been, in the defendant in error. It is not necessary for the defendant in error to rely upon the contract. On the other hand, the plaintiff in error bases its claim to retain the property

on the contract. It is attempting to take advantage of the illegal contract, while the defendant in error has disaffirmed the contract and asserts a right of recovery independent of the contract. The contract is not *malum in se*, but is merely *malum prohibitum*. The statute—section 2897 of the Revised Codes—makes it the duty of the county commissioners to contract with a newspaper of general circulation, published within the county for a period of six months prior to the making of the contract. The statute further provides:

“All newspapers which may receive any contract for printing under this act which may not be able to execute any part of such contract shall be required to sub-let such contract or portion of contract to some newspaper or printing establishment within the state, which may be competent to execute such work, at not to exceed the rates herein mentioned.”

No penalty for a violation of the statute is provided.

As the principles announced in the cases decided by the Supreme Court of Montana, and by the Supreme Court of the United States, to which reference has been made, are controlling, it is unnecessary to review or distinguish the many cases cited in the brief for plaintiff in error.

In conclusion, we respectfully submit that the judgment of the lower court should be affirmed.

JOHN B. CLAYBERG,
GUNN, RASCH & HALL,
Attorneys for Defendant in Error.

United States
Circuit Court of Appeals

For the Ninth Circuit.

LOW KWAI and MRS. LOW KWAI, Sometimes
Known as HO SHEE or HO (HAW) SHEE,
Appellants,

vs.

SAMUEL W. BACKUS, as Commissioner of Immi-
gration, Port of San Francisco,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for
the Northern District of California,
First Division.

Filed

JUN 8 - 1915

F. D. Monckton,
Clerk.

United States
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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UNITED STATES OF AMERICA.

District Court of the United States, Northern District of California.

Clerk's Office.

No. 15,591.

In the Matter of MRS. LOW KWAI, etc.

Praecipe (for Record on Appeal).

To the Clerk of said Court:

Sir: Please make up Transcript of Appeal in the above-entitled case to be composed of the following papers, to wit:

1. Petition for Writ of Habeas Corpus.
2. Order to Show Cause.
3. Demurrer to Petition.
4. Return.
5. Traverse to Return.
6. Opinion Discharging Writ of Habeas Corpus,
and Remanding Ho Shee.
7. Petition for Appeal.
8. Assignment of Errors.
9. Order Allowing Appeal.
10. Notice of Appeal.
11. Cost Bond on Appeal.
12. Citation, and Copy.
13. Clerk's Certificate.
14. Order Overruling Demurrer, Feb. 25, 1914.
[*1]
15. Letter or report of Commissioner of Immigration Transmitting Record to Secretary of Labor.

*Page-number appearing at foot of page of original certified Record.

16. Stipulation and Translation of Parts of Exhibit Attached to Petition, which are in the Chinese Language.

GEO. A. McGOWAN,
Attorney for Petitioner.

[Endorsed]: Filed Aug. 11, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [2]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

In the Matter of the Application of LOW KWAI,
upon Behalf of MRS. LOW KWAI, Some-
times Known as HO SHEE, or HO (HAW)
SHEE, on Habeas Corpus.

Order to Complete Transcript on Appeal.

Good cause appearing therefor, and upon motion of Walter E. Hettman, Assistant United States Attorney, in open court, on Tuesday October 27th, 1914, William Hoff Cook, of counsel for petitioner, Lo Kwai, being present in court, an order was duly made and entered that the transcript of appeal to the Circuit Court of Appeals in said cause shall include all the evidence submitted in the proceedings before this court, and that the following specified immigration documents, which were omitted from the praecipe for printing of transcript on appeal of counsel for said petitioner, be ordered printed and included in said transcript on appeal.

1. Memorandum for the Acting Secretary by Acting Commissioner-General of Immigration,

53575/255, dated Jan. 20, 1914, 7 pages.

2. Letter to Commissioner of Immigration, San Francisco, by F. H. Larned, Acting Commissioner-General, No. 53575, dated Jan. 27, 1914, transmitting said memorandum No. 1.

3. Warrant-Deportation of Alien, No. 53575/255, dated Jan. 27, 1914, signed J. B. Densmore, Acting Secretary of Labor. [3]

4. Following endorsement which appears on margin Warrant of Arrest of Alien, dated April 11, 1913, signed W. B. Wilson, Secretary of Labor:

“Executed at Sacramento, Calif., Oct. 17th, 1913.

JOHN A. ROBINSON,

Inspector.”

5. Verification of landing of Ho Shee, dated “Angel Island, Cal., April 3, 1913,” and showing original was signed by “Samuel W. Backus, Commissioner.”

6. Application for verification of landing of Ho Shee, dated Angel Island, Cal., April 2, 1913, (Signed) “H. Edsell, Acting Commissioner.”

7. Full transcript of testimony taken at Sacramento, Friday Oct. 17th, 1913, James Weaver, E. R. Malone, Anna Phelps, Rose Ying (10 pages in all), transcript certified Oct. 21, 1913, by “Jos. E. Pipher, Official Shorthand Reporter.”

October 31st, 1914.

M. T. DOOLING,

U. S. District Judge.

[Endorsed]: Filed Oct. 31, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [4]

*In the District Court of the United States, in and for
the Northern District of California, Division
No. 1.*

In the Matter of the Application of LOW KWAI,
upon Behalf of MRS. LOW KWAI, Some-
times Known as HO SHEE, or HO (HAW)
SHEE, on Habeas Corpus.

Petition for Writ of Habeas Corpus.

To the Honorable MAURICE T. DOOLING, Judge
of the United States District Court, in and for
the Northern District of California, Division
Number One:

The petition of Low Kwai respectfully shows:

That Mrs. Low Kwai, sometimes known as Ho Shee or Ho (Haw) Shee, and hereinafter referred to as the detained, is unlawfully imprisoned, detained, confined and restrained of her liberty by Samuel W. Backus, Commissioner of Immigration for the port of San Francisco, at the Immigration Station at Angel Island, County of Marin, State and Northern District of California.

That the said imprisonment, detention, confinement and restraint are illegal, and the illegality thereof consists in this, to wit: That it is claimed by the said Commissioner of Immigration that the detained is an alien person who had entered the United States on or about the 14th day of October, 1912, through the Port of San Francisco, where she had previously arrived on the Steamer "Siberia"; that she was accompanied on said trip by her husband,

Low Kwai (the petitioner herein), who is a native born citizen of the United States, and both your petitioner, the said Low Kwai, and the said detained were thereafter permitted to enter the United States as such citizen and the wife of such citizen by the appropriate Immigration authorities for the port of [5] San Francisco, and that the said detained continued to reside in the United States from said last mentioned date until the present time. And further, that upon the 11th day of April, 1913, a warrant for the arrest of the said detained was issued by the Secretary of Labor, wherein it was charged that the said detained was a prostitute and had been found practicing prostitution subsequent to her entry into the United States. And further, that upon the 17th day of October, 1913, the said warrant was executed by the arrest of the said detained; and further, that after the hearing accorded under the authority contained in said warrant the said Secretary of Labor, on or about the 24th day of January, 1914, issued a warrant of deportation against the detained, in which it was recited that the said detained was an alien prostitute and that she had been found practicing prostitution subsequent to her entry into the United States, and that she should be ordered deported to China, the country whence she came. That during the proceedings had under the warrant of arrest above recited, except as hereinafter specified, the detained was released upon bail in the sum of Two Thousand Dollars, and that the said detained is now in the custody of the said Commissioner of Immigration, and it is further

claimed by the said commissioner that he now holds the said detained in his possession by virtue of said warrant and that it is his purpose and intention to execute the said warrant of deportation by causing the detained to be deported upon the Steamer "China," sailing from the Port of San Francisco at 1 o'clock P. M. on or about February 3d, 1914; and it is further claimed by the said commissioner that the action of the Secretary of Labor, of himself as such commissioner, and his subordinate officers in the premises is authorized by the provisions of the Act of Congress of February 2d, 1907, entitled: "An Act to Regulate the Immigration of Aliens Into the United [6] States," and the Act amendatory thereto March 26th, 1910.

This petition is presented by your petitioner upon his own behalf and in his own right, as a native-born citizen of the United States of America and of the State of California and as the husband of the said detained, and also upon behalf of the said detained, she being in custody and unable to verify the said petition upon her own behalf.

Your petitioner alleges that the detained does not come within the restrictions or province of the said Act or Acts, but on the contrary your petitioner alleges that the said detained is, by virtue of her marriage to petitioner, who is a citizen of the United States as aforesaid, a citizen of the State of California and not an alien within the true meaning and intention of the said Act or Acts, and that for all of said reasons said warrant of arrest and all proceedings had thereon are illegal, null and void, and the

warrant of deportation issued as a result of the said proceedings is likewise illegal, null and void, and all for the reason that the said warrant of arrest and the said warrant of deportation are issued in excess of the authority or jurisdiction of the said secretary: That they are issued in violation of the said Act or Acts of Congress aforesaid and in violation of the Constitutional rights of your petitioner as such citizen of the United States and of the detained as the wife of such citizen and individually as such citizen of the State of California, in this:

1st. That by said executive proceeding it is attempted to deprive the petitioner, a citizen of the United States, of the society, protection, care and comfort of his wife, and to deport and banish her forever from the United States without a hearing before the judicial branch of the Government of the United States, and hence in violation of the guarantees to said petitioner as such citizen of the United States contained in [7] Section 2, Article III, of the Constitution of the United States.

2d. That by said executive proceeding it is attempted to deprive the detained, who is a citizen of the State of California by virtue of her said marriage to petitioner, of the society, protection, care and comfort of her said husband unless he follow her and be a party to her deportation and banishment from the United States, without according her a hearing before the judicial branch of the Government of the United States, in violation of her guaranties to her, the said detained, as such citizen of the State of California, and in violation of Section 2, Article III,

detained was injured and deprived of her right of counsel during said time, [9] and was prevented from exercising her rights under the rules and regulations promulgated under said Act or Acts, and thus deprived of her right to be present at a hearing had upon the 9th day of November, 1913, when testimony was taken from Daniel J. O'Brien, Miss Carrie G. Davis and Miss Donaldina Cameron; nor was the attorney for the detained notified of the said hearing, so that he could be present thereat. That the materiality of the said evidence so taken and the detrimental effect thereof to said detained may be observed by reference to Exhibit "A" hereinafter mentioned.

Fourth. That the said Immigration officials incorporated in the record against the said detained, testimony of James Weaver, taken in Sacramento on the 17th day of October, 1913, which said testimony was taken at a time when the right of counsel was withheld from said detained, and the said Immigration officials refused to set a time for a hearing in Sacramento, so that the detained might be accorded the opportunity of being present at said hearing, or having her counsel present thereat, for the purpose of submitting evidence upon her behalf from said witness James Weaver. That the motion of the said detained to strike from the files the testimony of the said witness James Weaver was not granted, and notwithstanding the fact that the Immigration officials conduct hearings in different matters in the City of Sacramento, they refused arbitrarily, and to the great detriment of said detained

and your petitioner, to permit the said witness James Weaver to be cross-examined at said place upon behalf of said detained. That the materiality of the testimony of the said witness James Weaver and the detrimental effect of the said testimony may be observed by reference to Exhibit "A" hereinafter mentioned. And in this connection, the said Immigration officials denied and refused the said detained any opportunity at all to submit evidence upon her own behalf from [10] the said witness James Weaver.

Fifth. That the said Commissioner of Immigration for the Port of San Francisco prejudiced the rights of the said detained herein upon the 7th day of November, 1913, by telegraphing to the Secretary of Labor as a fact that the said detained had violated the immigration law pending the adjudication of her case, when no evidence of any kind in support of said charge had been submitted in this case showing that said detained had violated the immigration law pending the adjudication of her case, all of which may be verified by reference to Exhibit "A" hereinafter mentioned.

Sixth. That upon the 9th day of November, 1913, at a time when the right of counsel was accorded the said detained, the said immigration officials, in violation of the right of counsel of the said detained, held a hearing at which testimony was submitted from Daniel J. O'Brien, Miss Carrie G. Davis and Miss Donaldina Cameron, and that said immigration authorities did not notify said detained or her counsel that said hearing was to be held, and in fact with-

held the knowledge of the fact that such a hearing had been held until the 9th day of December, 1913, when the said testimony was incorporated in the record against the detained, thus denying her any opportunity of being present at said hearing with her counsel, and the protest of the said detained to the incorporation of the said evidence in the record was not granted or upheld. And the further request of said detained that a time and place be set so that the said witnesses might be cross-examined upon her behalf was not granted by the said immigration authorities; and the further request that a time and place be set so that the detained and her counsel might be present to examine said witnesses upon behalf of said detained was refused, and no time nor place was set and no examination was permitted of said witnesses upon behalf of said detained. [11] That the evidence so complained of was material and detrimental to the detained, as will appear by reference to Exhibit "A" hereinafter mentioned.

Seventh. That the hearings against the said detained were unfair and unjust, that they certainly result in a flavor of mere mockery in that as the said rules and regulations are interpreted, the detained is compelled to submit her evidence in her case in opposition to the charge made against her, in the form of affidavits, the said detained maintaining and contending therein that such a course and class of procedure prevents her from having a fair and adequate opportunity to present her defense, and prevents the full value of her defense from being comprehended by the Secretary of Labor; and the class

of a hearing which the said Commissioner and the said Department of Labor officials have followed in this matter is unfair and unjust and deprives the detained of a fair opportunity to be heard, in this, that the Government presents its evidence by affidavits and oral examinations in such method and in such manner as to deprive the detained from any opportunity to examine or cross-examine the said Government witnesses; and by the said Government officers electing to examine their witnesses orally, while they withhold the right of counsel from the detained, and by their submitting the evidence of their witnesses by affidavits after they accord the right of counsel to the detained, the said officers thus prevent the detained from a fair and adequate or any opportunity of testing the value of the evidence of the said witnesses and showing its true worth or lack of value to the said Secretary of Labor.

~~Eighth. That after the conclusion of said pretended hearings and when the rights of the said detained could not be properly or at all safeguarded, the said Commissioner of Immigration did, your petitioner alleges upon information and belief, submit evidence of some kind, detrimental to said detainee ;~~
to [12]

Ninth. That after the conclusion of said pretended hearings and when the rights of the said detained could not be properly or at all safeguarded, the said Commissioner of Immigration did, your petitioner alleges upon information and belief, submit evidence of some kind, detrimental to said detained, to the Secretary of Labor and that said evi-

dence was never presented to the said detained, nor was an inspection thereof permitted or allowed, and that by reason of the said acts of the said Commissioner of Immigration the detained was denied any opportunity to see and inspect said evidence and to rebut the same, and that in so abridging and limiting the right of counsel of the said detained she has been prevented from showing the falsity of the said evidence believed to have been so presented by the said Commissioner of Immigration against the detained.

Tenth. That your petitioner has in his possession a full copy of the proceedings as a result of which it is sought to deport the detained, with the exception of the evidence or reports referred to in the subdivision immediately preceding, which said reports or evidence were submitted to the Secretary of Labor and are considered by said officers as private and secret communications, and no copy of the same can be obtained by your petitioner, nor has your petitioner, nor the detained herein, nor her counsel been accorded an opportunity to inspect or examine said supposedly secret or private communications or reports. A copy of said proceedings, otherwise complete, is contained in Exhibit "A" hereunto annexed.

That the said Samuel W. Backus, Commissioner of Immigration as aforesaid, is intending to execute the said order of deportation by deporting the said detained on the Steamer "China," sailing from the Port of San Francisco at 1 P. M., February 3d, 1913, and unless this Court intervene, the said detained will be carried beyond the jurisdiction of this Court.

That notwithstanding anything contained in said Exhibit "A" hereinbefore referred to, the said detained is not now and never has been an immoral woman or engaged in the practice of prostitution within the United States, nor at any other place, and the charge brought against her, and the evidence submitted against her have their origin from maliciously inclined people whom the Government has protected to the extent that it has prevented the detained from examining or cross-examining them to show the falsity of their accusations against said detained.

WHEREFORE, YOUR PETITIONER PRAYS that a writ of habeas corpus may issue, directed to the said Samuel W. Backus, staying the said order of deportation, and directing him to produce the body of the said detained before your Honor at a time and place to be specified in said order, together with the time and cause of detention of the said detained.

Dated February 2nd, 1914.

LOW KWAI (Character in Chinese),
Petitioner.

GEO. A. McGOWAN,

Attorney for Petitioner. [14]

United States of America,
State and Northern District of California,
City and County of San Francisco,—ss.

Low Kwai, being first duly sworn, deposes and says:

That he is the petitioner named in the foregoing petition; that the same has been read and explained to him and he knows the contents thereof; that the

same is true of his own knowledge except as to those matters which are therein stated on his information and belief, and as to those matters he believes it to be true.

(Chinese Character) LOW KWAI.

Subscribed and sworn to before me this 2d day of February, 1914.

[Seal]

GEO. F. CAVALLI,

Notary Public in and for the City and County of San Francisco, State of California. [15]

**Application for Warrant of Arrest Under Sections
20 and 21 of the Act of February 20, 1907.**

U. S. DEPARTMENT OF LABOR.

IMMIGRATION SERVICE.

No. 12020-190.

(Place) Angel Island Station, S. F. Cal.

April 2, 1913, — 191—.

The undersigned respectfully recommends that the Secretary of Labor issue his warrant for the arrest of Ho Shee, or Haw Shee, the alien named in the attached certificate, upon the following facts which the undersigned has carefully investigated, and which, to the best of his knowledge and belief, are true:

(1) (Here state fully facts which show alien to be unlawfully in the United States. Give sources of information, and where possible, secure from informants and forward with this application duly verified affidavits setting forth the facts within the knowledge of the informants.)

Herewith find verification of landing. It is stated

from an anonymous source that this woman is now practicing prostitution in either the Oriental Hotel or the Republic Hotel, keeping one of the rooms in either hotel from time to time.

She was landed as the wife of a native, but her husband deserted her.

(2) The present location and occupation of above-named alien are as follows: ——— [16]

Pursuant to Rule 22 of the Immigration Regulations there is attached hereto and made a part hereof the certificate prescribed in subdivision 2 of said Rule, as to the landing or entry of said alien, duly signed by the immigration officer in charge at the port through which said alien entered the United States.

(Signature) (Sgd.) H. EDSELL,
(Official title) Acting Commissioner.

Inclosure—#15653.

FHA/MAH.

Copy-LED. [17]

Warrant—Arrest of Alien.

UNITED STATES OF AMERICA.

U. S. Department of Labor.

Washington.

No. 53575/255.

Incl. No. 3610.

To Samuel W. Backus, Commissioner of Immigration, Angel Island Station, San Francisco, California.

WHEREAS, from evidence submitted to me, it appears that the alien Ho Shee, or Haw Shee, alias Ho Shi, who landed at the port of San Francisco, Cal., ex SS "Siberia," on . . . the 14th day

of October, 1912, has been found in the United States in violation of the Act of Congress approved February 20, 1907, amended by the Act approved March 26, 1910, to wit:

That the said alien is a prostitute and has been found practicing prostitution subsequent to her entry into the United States.

COPY.

I, W. B. Wilson, Secretary of Labor, by virtue of the power and authority vested in me by the laws of the United States, do hereby command you to take into custody the said alien and grant her a hearing to enable her to show cause why she should not be deported in conformity with law.
[18]

The expenses of detention hereunder, if necessary, are authorized, payable from the appropriation, "Expenses of Regulating Immigration 1913." Pending disposition of her case the alien may be released from custody upon furnishing satisfactory bond in the sum of \$2,000.00.

For so doing, this shall be your sufficient warrant.

Witness my hand this 11th day of April, 1913.

(Sgd.) W. B. WILSON,

Secretary of Labor.

WW.

Copy-LED. [19]

**[Letter, Dated April 11, 1913, Secretary to
Commissioner, Transmitting Warrant.]**

DEPARTMENT OF LABOR.

WASHINGTON.

No. 53575/255.

April 11, 1913.

Commissioner of Immigration,
Angel Island Station,
San Francisco, Cal.

Pursuant to your request of the 2nd instant, No. 12020/190, there is transmitted herewith warrant for the arrest of the Chinese alien Ho Shee, or Haw Shee, *alias* Ho Shi. This warrant should not be executed, however, unless your investigation develops facts justifying such action.

Form 533, forwarded with your application, is inclosed, as requested.

(Sgd.) W. B. WILSON,
Secretary.

Incl. No. 3610-3611.

WW.

Copy-LED. [20]

[Testimony of Tien Fuh Wu, Taken Before
Inspector October 20, 1913.]

DEPARTMENT OF LABOR.
IMMIGRATION SERVICE.

No. 12020—190.

Angel Island, Cal., October 20, 1913.

In re HO SHEE, *alias* HAW SHEE, *alias* HO
SHI, Arrested Under Departmental Warrant
#53575/255, Dated April 11, 1913.

Examining Inspector—W. H. CHADNEY.

Stenographer—L. E. DINKLAGE.

Witness sworn. Examination in English.

(By Inspector.)

Q. What is your name and business?

A. Tien Fuh Wu, Assistant Superintendent Presbyterian Mission Home.

Q. Do you know this Chinese girl? (Showing Haw Shee, *alias* Ho Shi.) A. Yes.

Q. Will you state when, how, and under what circumstances you know her?

A. Last November someone sent word to us that she and another girl would like to be rescued from the Oriental Hotel and Miss Cameron and some American friends and I went to get them, and she was in the Home for several months.

Q. You got her out of the Oriental Hotel?

A. Yes, from the Oriental Hotel on Stockton Street, where they had been leading an immoral life. After we brought her to the home she told me that her husband brought her over for Choy Kum, a Chinese known to us as [21] a slave owner, and

(Testimony of Tien Fuh Wu.)

she also stated to me that she did not want to lead an immoral life; also that this Choy Kum had taken her baby away from her and sold it to another slave owner by the name of Wong. She asked Miss Cameron and me to help her rescue this little boy, but we were busy and could not attend to it, and she got restless and left the Home without our knowledge.

Q. You have heard of her in different places practicing prostitution since her escape from the Home?

A. Yes, we heard she was first in Yreka and then in Lodi, at which time, if you remember, Inspector Chadney, you searched several Chinese places there but was not successful in finding her at that time. Our latest advice was that this girl was in Sacramento, and I understand that Inspector Robinson arrested her there last Friday.

Q. What information have you as to how this woman supports herself?

A. She has no way of earning her living at all. She told us she was practicing prostitution for over a month at this Oriental Hotel, and ever since she left the Home we heard from various people that she was leading an immoral life.

I hereby certify to the correctness of the foregoing transcript.

L. E. DINKLAGE,
Stenographer. [22]

[Testimony of Donaldina Cameron, Taken Before
Inspector October 20, 1913.]

DEPARTMENT OF LABOR.
IMMIGRATION SERVICE.

No. 12020—190.

Angel Island, Cal., October 20, 1913.

In re HO SHEE, *alias* HAW SHEE, *alias* HO
SHI, Arrested Under Departmental Warrant
#53575/255, Dated April 11, 1913.

Examining Inspector—W. H. CHADNEY.

Stenographer—L. E. DINKLAGE.

Witness sworn. Examination in English.

(By Examining Inspector.)

Q. What is your name and business?

A. Donaldina Cameron, Superintendent Presbyterian Chinese Mission Home.

Q. I will ask you, Miss Cameron, if you recognize this woman? (Indicating alien Ho Shee, *alias* Haw Shee.)

A. Yes, Mr. Chadney, I do.

Q. As whom?

A. I know this woman as Yut Kwai. I know her to be a Chinese prostitute, because we rescued her at the same time we rescued another Chinese slave girl last year. She remained in our Mission Home for a short period, and while she was there she discussed freely her life in Chinatown as a slave girl and the hardships of that life, and told us who her owner was and also told us that the little child that she brought over with her from China and landed as her son had been sold to a Chinese person. [23] She ultimately ran away from the Home by climbing over

(Testimony of Donaldina Cameron.)

the fence at night. From that time until the present we have been seeking to locate her, but were unable to do so.

Q. You know, from the admissions of this person, that she is and has been a prostitute for some time past?

A. Yes, from her own admissions and the conditions under which we found her at the time we rescued her convince me that she was a prostitute.

Q. Where did you rescue her from?

A. At the Oriental Hotel, which is known to me to be a place where Chinese slave owners take them at night to practice their business.

Q. Do you know about when she was at the Home?

A. It was the latter part of November, 1912.

Q. Since her escape you have been actively engaged in trying to rescue her?

A. Yes, we have made repeated efforts to locate her.

I hereby certify to the correctness of the foregoing transcript.

L. E. DINKLAGE,
Stenographer. [24]

[Testimony of Ah Ho. Taken Before Inspector,
October 21, 1913.]

DEPARTMENT OF LABOR.
IMMIGRATION SERVICE.

No. 12020—190.

Angel Island, Cal., October 21, 1913.

In re HO SHEE, *alias* HAW SHEE, *alias* HO
SHI, Arrested Under Departmental Warrant
#53575/255, Dated April 11, 1913.

Examining Inspector—W. H. CHADNEY.

Stenographer—L. E. DINKLAGE.

Interpreter—LUM YING.

Examination in Chinese.

Alien sworn by Inspector through Interpreter.

—Q. What is your name? A. Ah Ho.

Q. Any other name? A. No other name.

Q. Were you ever known by the name of Haw
Shee? A. Yes.

Q. Also by the name of Ho Shee?

A. Only by Haw Shee and Haw Ah Ho.

Q. How old are you? A. 23.

Q. When did you last arrive in the United States?

A. The end of last year.

Q. About what month, do you remember?

A. Arrived here the first part of the ninth month.

Q. On what papers?

A. As the wife of a native. (Record shows Low
Kwai, "Siberia," October 14, 1912.) [25]

Q. You arrived herein October, 1912? A. Yes.

Q. Where did you go when you landed?

A. Went to a lodging-house in San Francisco.

(Testimony of Ah Ho.)

Q. Do you remember the name of the lodging-house? A. I don't know.

Q. Did your husband go with you to the lodging-house? A. Yes.

Q. How long did you and your husband, Low Kwai, live together after your arrival?

A. Short while.

Q. About a week, or month, or how long?

A. I do not remember now.

Q. A couple of weeks, or month or what? As near as you can remember.

A. I don't remember; not very long.

Q. After your husband left you, how did you support yourself? A. My husband sent me the money.

Q. After your husband left you, did you still continue to live at that hotel?

A. No, I went with him.

Q. Was the name of the hotel where you were staying with your husband, the Oriental Hotel?

A. I don't know.

Q. Do you know Miss Cameron? A. No.

Q. Do you know Miss Wu?

A. I don't remember. I do not want to say any more until my lawyer gets here.

Q. How long did you stay at the Mission after you went there? A. Two months.

Q. Did you go there voluntarily?

A. I don't know.

Q. Who took you from the Oriental Hotel to the Mission?

A. Came with the missionary woman. [26]

(Testimony of Ah Ho.)

Q. You stayed there two months? A. Yes.

Q. Where did you go after you left the Mission?

A. I looked for my husband.

Q. And did you find him? A. Yes.

Q. Where is your husband now?

A. I don't know where.

Q. Did you live with him after you left the Mission? A. Yes.

Q. Where? A. In Sacramento.

Q. Have you any children? A. No.

Q. Did you ever have any children? A. No.

Q. Did you not have a baby boy?

A. No, never had one.

Q. We have certain information that someone stole your boy and sold him and if we can possibly do anything to help you to recover your child we will be only too glad to do so, if you will allow us to do so.

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(Inspector continues.)

A. Yes, I had a boy, but not by me. He belongs to my husband's first wife.

Q. Was this child your adopted child? A. No.

Q. Did you not look upon this child as yours?

A. Yes.

Q. About how old was the baby when you got it?

A. A little over a year old.

Q. Do you know where the boy is now?

A. I do not know what my husband did with him.

Q. Is it a fact that your alleged husband took the child from you and sold him or disposed of him in some way contrary to your wishes in the matter?

(Testimony of Ah Ho.)

A. Being the father of the child he has a right to take him wherever he wants to.

Q. Whether you object or not? A. Yes. [27]

Q. You say that you went to Sacramento after you left San Francisco?

A. Yes, I arrived in Sacramento only a few days ago. My husband went with me to Sacramento and he left there for some other city and I was arrested on the street in Sacramento.

Q. Did you ever go to Yreka? A. No.

Q. Were you ever in Lodi? A. No.

Q. Were you ever in Stockton? A. No.

Q. If you have only lived in Sacramento for a few days, where were you living during the interval between October, 1912, and October, 1913?

A. I went to another city, but I do not know the name.

Q. Did you go there alone?

A. With my husband.

Q. With the husband who landed you or with another man? A. Low Kwai.

Q. Is that the same man you were landed to as his alleged wife in October, 1912? A. Yes.

Q. Has he ever contributed anything to your support? A. Yes.

Q. Were you ever known by the name of Fong Gin? A. Yes.

Q. Is this your bank-book? A. Yes.

Q. How much money have you in the bank?

A. You can see in the book how much I have there.

Q. Was this your own personal account?

(Testimony of Ah Ho.)

A. Yes.

Q. And this is money you earned yourself?

A. No, I saved that from the amount of money my husband gave me.

Q. Would you have us believe that you have saved \$400 from money that your husband gave you, you only having been here since October, 1912?

A. My husband gave me some gold jewelry which I had no use for, so I changed that into money, too.
[28]

Q. How long have you had money on deposit in this bank? A. Just a few weeks.

Q. What was your address in Sacramento?

A. I don't know the name of the street.

Q. Was it in China Alley? A. No.

Q. Were you living in a rooming-house?

A. Yes, lodging-house.

Q. Are these letters (indicating pile of letters) yours, or any of them belong to you at all? A. No.

Q. Is this a picture of your husband, Low Kwai?

A. No.

Q. Is this a picture of your husband? A. No.

Q. Is his picture here?

A. These things do not belong to my husband.

Q. Do you know to whom they belong?

A. I don't know.

Q. Were these papers not taken from the place where you were living in Sacramento? A. No.

Q. Do you know where the inspector got them?

A. I do not.

(Testimony of Ah Ho.)

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Q. Did you live at 907 China Alley, Sacramento?

A. No.

Q. When you were taken from the Oriental Hotel in San Francisco by the missionaries was it not due to the fact that you asked their assistance to rescue you from a life of shame? A. No.

Q. Did you not tell the missionaries at the Home that you wanted to live a decent life and not live at the Oriental Hotel as a prostitute? A. No. [29]

Q. Is it not a fact that at the time you were rescued by Miss Cameron and the other missionaries in November, 1912, that the circumstances in which you were found would convince one that you were living an immoral life? A. No.

Q. Did you not tell the missionaries that you wanted to live a decent life and not continue to be a slave girl? A. No.

Q. Did you not also ask them to assist you in recovering your little boy that you just spoke of?

A. No.

Q. Do you know Choy Kum? A. No.

Q. Did you ever see him? A. No.

Q. Is it not a fact that your husband, Low Kwai, gave you to Choy Kum as a slave girl? A. No.

Q. Will your husband, Low Kwai, appear here in your behalf in case he was notified?

A. He will have to.

Q. Will you tell us where we can find him?

A. I do not know his address, but you can advertise in the Chinese paper.

(Testimony of Ah Ho.)

Q. What name is he known by? Give all his names. A. Low Kwai. No other name.

Q. How old is he? A. 38.

Q. How long is it since you have seen him?

A. Several days ago.

Q. And you do not remember the number of the house where you were living in Sacramento?

A. No.

Q. Do you refuse to remember?

A. No, but I do not remember the number and I don't know the street.

Q. How long did you live there?

A. Several days.

Q. Was it several months or several days?

A. Several days.

Q. Where did you live before you went to Sacramento?

A. Do not know the name of the city. [30]

Q. Have you not lived in several cities since your departure from San Francisco?

A. No, only Sacramento and one other.

Q. Did the missionaries give you permission to leave the Home when you left?

A. I walked out myself.

Q. Daytime or night-time? A. Daytime.

Q. Who assisted you to escape?

A. No one helped me.

Q. Did you not have someone to meet you when you left the Home? A. No.

Q. Did you leave the Home by the regular entrance or in what way did you leave there?

(Testimony of Ah Ho.)

A. Regular entrance.

Q. With the permission of the missionaries?

A. No, but why should they detain me when I have a husband?

Q. Is it not a fact that you were at this Home at your own request? A. No.

Q. Would you have us believe that you were confined in this Home for two months against your will?

A. Yes, I was not allowed to go out.

Q. Is it not a fact that you went to school every day? A. No.

Q. Is it not a fact that you did submit to the rules of the Home and remained there voluntarily until you were induced to escape by some person not connected with the Home?

A. No. I was not allowed to go out and no one could talk to me. [31]

No. 12020—190

10/21/13

Q. Is it not a fact that you were allowed every freedom at the Home?

A. No, I did not ask to be rescued.

Q. Is it not a fact that you and another Chinese girl were rescued at the same time and from the same place, the Oriental Hotel? A. I don't know.

Q. Do you refuse to answer that question?

A. No, but I really do not know if there was another woman or not.

Q. Is it not a fact that you and another girl were rescued at the same time by the same missionaries?

A. No, I don't know.

Q. What was your husband's business or occupa-

(Testimony of Ah Ho.)

tion? A. Merchant.

Q. Of what firm is he a member?

A. I don't know his address, or I don't know what line of business he is engaged in. He never told me.

Q. Did you ever know what line of business he was engaged in?

A. He is a merchant, but I don't know what line of business.

Q. Then you cannot positively state whether he is a merchant or not? A. No, only hearsay.

Q. You never visited the store where he was a member? A. No.

Q. Have you any friends or relatives in the United States except your husband? A. No.

Q. You never had any relatives here except your husband, did you? A. No.

Q. Has your husband any relatives in the United States? Blood relatives? A. I don't know.

Q. Did you ever meet any of his relatives?

A. No. [32]

Q. Then you do not know whether he has any relatives or not? A. No.

Q. Do you believe if he had had any relatives you would have met them?

A. I met so many people I do not know who they were.

Q. But you know positively that he has no relatives in the United States? A. Yes.

(By Inspector.)

Pursuant with instructions contained in Departmental warrant No. 53575/255 dated April 11, 1913,

(Testimony of Ah Ho.)

signed by H. B. Wilson, Secretary of Labor, you are now brought before me, an immigrant inspector, to show cause, if any you have, why you should not be deported as an immoral person having been found practicing prostitution subsequent to your entry into the United States. You are advised that you have the right to be represented by counsel and that your attorney may inspect the record.

Q. Do you wish to have an attorney?

A. I will see about that.

Q. You are also advised that you may be released from custody upon furnishing satisfactory bond in the sum of \$2000. Have you any reason to advance why you should not be deported? You are now given ample opportunity to show cause if any you have.

A. I do not see how I could be arrested when I was with my husband.

Q. Have you any further statement to make at this time? A. No.

Q. Have you understood the interpreter?

A. Yes. [33]

Interpreter Robt. Lym called and asked alien if she understood Interpreter Lum Ying, to which she replied "Yes."

I hereby certify to the correctness of the foregoing transcript.

L. E. DINKLAGE,
Stenographer. [34]

[Letter, Dated October 25, 1913, Commissioner to
Mr. McGowan.]

DEPARTMENT OF LABOR.
IMMIGRATION SERVICE.

Office of the Commissioner,
Angel Island Station,
via Ferry Postoffice,
San Francisco, Cal.

October 25, 1913.

F. H. A.

12020/190.

In answering please refer to
George A. McGowan, Esquire,
Bank of Italy Building,
San Francisco, California.

Sir:

You are advised that the case of Ho Shee will be closed on Thursday, November 6th, at which time you are requested as attorney for the alien to make such showing as you deem proper as to why she should not be deported.

Respectfully,
SAMUEL W. BACKUS,
Commissioner. [35]

**[Letter, Dated November 5, 1913, Mr. McGowan to
Commissioner.]**

San Francisco, California, November 5th, 1913.
Hon. Samuel W. Backus,
Commissioner of Immigration,
Port of San Francisco.

Dear Sir:

In re Haw Shee, *alias* Ho Shee, No. 12020/190.
53575/255.

I desire to request, in the above-entitled case, that the time within which the defense of the defendant is to be submitted, be enlarged from November 6th to and including November 11th, 1913. In explanation of this request I desire to state that the warrant in this matter was issued on April 11th, 1913, while it was not executed until October 17th. From a reading of the testimony which you have submitted against the defendant it is apparent that evidence will have to be procured from at least Sacramento, and possibly from other out of town places, and inasmuch as I did not procure even my partial copy of the record until October 28th, I deem it necessary that this additional extension should be allowed, to enable the defendant to show cause why she should not be ordered deported.

Thanking you in advance for this courtesy, I remain,

Yours very respectfully,

GEO. A. MCGOWAN,

Attorney for Defendant, Haw Shee, *alias* Ho Shee.

[Letter, Dated November 7, 1913, Commissioner to
Mr. McGowan.]

DEPARTMENT OF COMMERCE AND LABOR.
IMMIGRATION SERVICE.

Office of the Commissioner,
Angel Island Station,
via Ferry Postoffice,
San Francisco, Cal.

F. H. A.

No. 12020-190.

November 7, 1913.

Geo. A. McGowan, Esq.,

Bank of Italy Bldg.,

San Francisco, Cal.

Sir:

Receipt is acknowledged of your letter of November 5th asking a continuation until November 11th in the case of Haw Shee arrested under warrant #53575/255. In view of the circumstances which you recite, your request for continuation is granted.

Respectfully,

SAMUEL W. BACKUS,

Commissioner. [37]

[Letter, Dated November 10, 1913, Mr. McGowan to
Commissioner.]

GEORGE A. McGOWAN,
Attorney and Counsellor at Law.
Bank of Italy Building,
Montgomery and Clay Streets,
San Francisco, California,
Telephone, Kearny 3092.
San Francisco, Calif., Nov. 10th, 1913.

Hon. Samuel W. Backus,
Commissioner of Immigration,
Port of San Francisco.

Dear Sir:

In re How Shee—Departmental Arrest—12020/190
53575/255

The record in the above-entitled case discloses that
you applied for the warrant in this matter on April
2d, representing that:

“It is stated from an anonymous source that
this woman is now practicing prostitution in
either the Oriental Hotel *of* the Republic Hotel,
keeping one of the rooms in either hotel from
time to time.”

Upon the 11th of April the Secretary issued the
warrant of arrest, as requested, and contempora-
neously with the issuance of said warrant wrote you
as follows:

“This warrant should not be executed, how-
ever, unless your investigation develops facts
justifying such action.”

Upon October 17th, the warrant in this matter was

executed at Sacramento and the testimony of some four or five witnesses was taken in this matter at said time. I believe on Tuesday, October 21st, this detained was released upon bond and I was shortly thereafter recognized as her attorney and permitted to represent her. I filed a written request for a copy of the record, and outside [38] of the formal papers I received but the examination of Donaldina Cameron and Tien Fuh Wu. Upon Saturday, November 8th, I discovered that other testimony which had been taken in this case at Sacramento had not been submitted to me for my inspection, and now I desire to request that a copy of said testimony be prepared for my use in this case at my expense.

I desire further to protest against this detained being taken into custody upon, I believe, Thursday the 6th of November, when she was at liberty upon bond in this matter, and as her attorney I desire to request an explanation as to why she was taken into custody, and also why your office represented to the Secretary of Labor that this defendant had committed subsequent infractions of the Immigration Law. This charge is denied by the detained and we desire to except to the manner in which her case has been prejudiced by the action of your office in the premises. Upon November 7th you advised me that this case would be continued until November 11th, for the defendant to make her showing why she should not be ordered deported, and I desire to state in this connection, upon her behalf, that it is essential that she have her liberty to enable her to prepare her defense, and further, that a continuance is necessary

for us to answer your evidence taken at Sacramento and which was not disclosed to the attorney for the detained until last Saturday, the 8th instant.

Yours very respectfully,

GEORGE A. McGOWAN,

Attorney for Defendant Ho Shee. [39]

**[Letter, Dated November 10, 1913, Commissioner to
to Mr. McGowan.]**

DEPARTMENT OF COMMERCE AND LABOR.
IMMIGRATION SERVICE.

Officer of the Commissioner,
Angel Island Station,
via Ferry Postoffice,
San Francisco, Cal.

November 10, 1913.

R. E. P.

No. 12020-190.

Geo. A. McGowan, Esq.,

Bank of Italy Building,

San Francisco, Cal.

Sir:

Receipt is acknowledged of your letter of November 10th in the case of Ho Shee who was arrested in a Chinese raid a few days ago, and whom the Department ordered taken into custody again without bail. In view of the recent developments in this case the case will not be closed until further notice.

Respectfully,

SAMUEL W. BACKUS,

Commissioner.

REP/LED. [40]

[Statement of James Weaver, Taken at Police Station, Sacramento, Cal., by Inspector, October 17, 1913.]

Sacramento, California, Friday, October 17, 1913.

In re

Department Warrant 53575, Slant 255,

In Case of HO SHEE.

STATEMENT OF WITNESS taken at Police Station, Sacramento, California, by John A. Robinson, Inspector U. S. Immigration Department, there being also present Mr. J. H. McClymont, Chinese Interpreter.

Statement of Witness—JAMES WEAVER.

JOSEPH E. PIPHER,

Courthouse, Sacramento, California, Official Shorthand Reporter.

Police Station, City of Sacramento, Sacramento, California, Friday, October 17, 1913.

STATEMENT OF JAMES WEAVER, Police Officer of the City of Sacramento, who, after being first duly sworn by John A. Robinson, Inspector, testifies as follows, to wit:

Mr. ROBINSON.—Q. What is your name?

A. James Weaver.

Q. And how old are you, Mr. Weaver?

A. Twenty-three.

Q. What is your occupation?

A. Occupation, police officer.

Q. Of Sacramento? A. Of Sacramento.

Q. Now, how long have you held such position; how

long have you been a police officer here?

A. I have been a police officer over seven months.

Q. Is your beat in what is commonly known as the tenderloin district? A. Yes, sir.

Q. Chinese tenderloin district?

A. It is; it comprises all of Chinatown.

Q. Are you familiar with the Chinese houses of prostitution in [41] Chinatown, Sacramento?

A. I am.

Q. Do you recognize this woman here (referring to one Ho Shee)?

A. I positively identify her as being one of the inmates of a Chinese house of prostitution at 410-1/2 in the alley.

Q. 410 1/2 China alley?

A. No; 410 1/2 alley I and J, Fourth and Fifth, Sacramento.

Q. Now, do you know what her name is? I don't know what her name is; I have not heard it.

Mr. ROBINSON.—(Referring to a Chinese woman Ho Shee, for whom Department warrant 53575, slant 255 was issued the eleventh day of April, 1913.)

Q. How long have you known this woman—referring to Ho Shee—to be a prostitute in Chinatown, Sacramento? How long have you seen her there?

A. Just a moment, now, until I get it exactly.

Q. Approximately, is all.

A. Approximately?

Q. Yes.

A. Approximately over three months, all of which time she has been a continual inmate of a house of

prostitution.

Q. And then you say you saw her in bed with Chinamen?

A. I have seen her partly disrobed with Chinamen. I have seen her in bed with Chinamen at one time—different Chinamen each time.

Q. And you positively know that the place that you saw this woman, referred to Ho Shee, was a Chinese house of prostitution?

A. I do, for the man that ran it said it was a house of prostitution, and described her to me as being one of the girls that were prostitutes, at the same time saying that one of them was not a prostitute, but was sick.

Q. What is the name of the man whom you know to be the keeper of this house of prostitution on 410 $\frac{1}{2}$?

A. The man's name was Louie Ding.

(Sgd.) JAMES WEAVER.

Address: Police Department, Sacramento, California. [42]

State of California,

County of Sacramento,—ss.

I hereby certify that as shorthand reporter I took down in shorthand writing the statement of James Weaver, in the matter above entitled, made before John A. Robinson, Inspector, on Friday, October 17th, 1913; that my shorthand notes contain a full, true and correct record in shorthand of said statement; that I have personally transcribed my said shorthand notes into longhand type-writing, and that the foregoing two pages, with this page, constitute my

transcription; that same is a full, true and correct transcription of my said shorthand writing aforesaid, and same constitutes and is a full, true, correct, accurate and *verbatim* statement of the testimony of said James Weaver given on said 17th day of October, 1913, as aforesaid.

Dated, Sacramento, October 31, 1913.

(Sgd.) JOS. E. PIPHER,
Official shorthand reporter.

Copy. LED 11/11/13/. [43]

[Telegram, Dated November 7, 1913, Commissioner
to "Immigration."]

Commissioner
Angel Island, Cal.
November 7, 1913.

Western Union.

Immigration, Washington, D. C.

Case of Ho Shee warrant arrest dated April eleventh, fiftythree five seventy-five sub two-fifty-five. Alien arrested October seventeenth. Released on bail October twenty-first. Woman again arrested in Peking Hotel. Will another warrant issue or can Department refuse to continue enlargement upon bail because of fact that alien violated law pending adjudication of her case?

BACKUS.

Attest: (Sig.) SAMUEL W. BACKUS,

Commissioner.

12020/190

FHA/LED.

**[Telegram, Dated November 7, 1913, Acting
Secretary to Immigration Service.]**

A.M.B. 3:15 P. M.

31 Govt.

Washington, D. C.

Nov 7 1913.

Immigration Service,

San Francisco, Calif.,

Authority to admit Ho Shee to bail cancelled.
Take her into custody. Petition court to cancel
order admitting Chan Kam to bail.

LOUIS F. POST, Acting Secy.

COPY—LED—11/11/13. [44]

**[Letter, Dated November 11, 1913, Mr. McGowan to
Commissioner.]**

GEORGE A. MCGOWAN,

Attorney and Counsellor at Law.

Bank of Italy Building,

Montgomery and Clay Streets.,

San Francisco, California,

Telephone Kearny 3092.

San Francisco, Calif. Nov. 11th, 1913.

Hon. Samuel W. Backus,

Commissioner of Immigration,

Port of San Francisco.

Dear Sir:

In re Ho Shee, Departmental Arrest case 12020/190
53575/255

With respect to the right of bail in the above-
entitled matter, I desire to advise you that I caused

this question to be taken up by Messrs. Stadden & Stewart, our Washington representatives, with the Acting Secretary of Labor, representing to the Department that bail in a matter of this kind was a statutory right, and I this morning received a telegraphic advice stating that the Assistant Secretary, Mr. Post, would approve a new bond for Ho Shee and directing me to request you to fix the amount of the bail. Unless you have any contrary or other advices, or no advice at all, I would understand it that I should request you to express to the Department the amount of bail which you would deem sufficient in this matter to insure the presence of the defendant as might hereafter be required in her case, and that you receiving this information from you the Acting Secretary would then send the authorization to you to receive a new bond. At any rate, if you have no advices from the Department, I am willing in this matter to defray the expense of your telegram in the premises, as well as its answer.

Yours very respectfully,

GEO. A. MCGOWAN,

Attorney for Ho Shee. [45]

**[Telegram, Dated November 12, 1913, Larned to
Immigration Service.]**

COPIES OF TELEGRAMS.

23 Govt.

Washington, D. C.

November 12, 1913.

Immigration Service,

San Francisco, Cal.

Do you recommend that Ho Shee or Chan Kam be admitted bail. If so what amounts each case.

LARNED.

**[Telegram, Dated November 13, 1913, "Backus" to
Immigration Bureau.]**

Postal Telegraph Co.

Office of Commissioner,
Port of Angel Island, Cal.
November 13, 1913.

Immigration Bureau,
Washington, D. C.

Your telegram yesterday. This office understands bonds cannot be denied either Ho Chi or Chan Kum at this stage present procedure. Condition our allotment furthermore makes advisable relieve it all unnecessary maintenance charges. Therefore recommend release both case three thousand each.

BACKUS.

**[Telegram, Dated November 14, 1913, Acting
Secretary to Immigration Service.]**

Washington, D. C.
November 14, 1913.

Immigration Service,
San Francisco, Cal.

Relay Ho Shee and Chan Kum thirty each.

LEWIS F. POST,
Act. Secretary. [46]

**[Letter, Dated November 29, 1913, Commissioner to
Mr. McGowan.]**

U. S. DEPARTMENT OF LABOR.
IMMIGRATION SERVICE.

F. H. A.

In answering please refer to
No. 12020-190.

Office of the Commissioner,
Angel Island Station,
via Ferry Postoffice,
San Francisco, Cal.
November 29, 1913.

Geo. A. McGowan, Esq.,
Bank of Italy Building,
San Francisco, Cal.

Sir:

You are advised that the case of Ho Shee, arrested under Department warrant No. 53575/255, will be closed December 10, 1913, at which time it is expected you will have such evidence in as you may desire to submit why deportation should not be effected.

Respectfully,
SAMUEL W. BACKUS,
Commissioner.

FHA/LED. [47]

**[Letter, Dated December 9, 1913, Commissioner to
Mr. McGowan.]**

U. S. DEPARTMENT OF LABOR.
IMMIGRATION SERVICE.

F. H. A. No. 12020-190.

Office of the Commissioner,
Angel Island Station,
via Ferry Postoffice,
San Francisco, Cal.
December 9, 1913.

Geo. A. McGowan, Esq.,
Bank of Italy Building,
San Francisco, Cal.

Sir:—

Receipt is acknowledged of your letter of November 10th regarding the arrest of Ho Shi in the Peking Hotel. You are advised that there are in the file for your inspection and use, three (3) affidavits showing the Peking Hotel to be a house of prostitution.

Respectfully,
SAMUEL W. BACKUS,
Commissioner.

FHA/LED. [48]

**[Affidavit, Dated November 20, 1913, of Daniel J.
O'Brien.]**

San Francisco, Cal., November 20, 1913.

Daniel J. O'Brien, being duly sworn, deposes and says:

My name is Daniel J. O'Brien. I am an acting Sergeant of Police, and have been an officer in the San

Francisco Police Department for the past 5 years. During the year 1913, from July 19th to November 14th, I was in charge of the police detailed in Chinatown, and, by reason of said detail, I know the premises at #770 Commercial St., the Hotel Peking, by general reputation to be a place where Chinese prostitutes gathered and where prostitution was practiced.

I have had this statement read to me, and I know its contents to be true.

(Sgd.) DANIEL J. O'BRIEN.

Subscribed and sworn to before me this 20th day of November, 1913.

(Sgd.) JOHN A. ROBINSON,
Immigrant Inspector.

Copy—LED—11/22/13/ [49]

[Affidavit, Dated November 20, 1913, of Carrie G. Davis.]

San Francisco, Cal., Nov. 20, 1913.

Miss Carrie G. Davis, being duly sworn, deposes and says:

I am the Superintendent of the Methodist Chinese Girls' Home at 940 Washington Street, San Francisco, California, for the past two years. During the past six months my attention has been frequently called to the premises known as the Peking Hotel, 770 Commercial St. San Francisco, that is generally known by reputation as a Chinese house of prostitution. The reputed manager being a Chinaman known as Louis Quong whom I have known by reputation for many years past as a dealer in slave girls.

On or about November 3rd of this year word was brought to me about some young Chinese girls held as slaves in there, being too ill to make the raid myself I turned the information over to the Government officers.

(Sgd.) CARRIE G. DAVIS.

Subscribed and sworn to before me this 20th day of November, 1913.

(Sgd.) JOHN A. ROBINSON,
Immigrant Inspector.

Copy—LED—11/22/13/. [50]

**[Affidavit, Dated November 20, 1913, of Donaldina
Cameron.]**

San Francisco, Cal. November 20, 1913.

Miss Donaldina Cameron, being duly sworn, deposes and says:

I am the Superintendent of the Presbyterian Chinese Mission, located at #920 Sacramento St., San Francisco, Cal., and have occupied said position for the past 17 years. During the past 6 months my attention has frequently been called to the premises known as the Peking Hotel, #770 Commercial St., San Francisco, which, by general reputation, is known as a Chinese house of prostitution, the reputed manager being a Chinaman known as Louie Quong, whose name has for many years been identified with the slave traffic. During the past 6 months several complaints have been lodged at the Chinese Presbyterian Mission as to young Chinese girls being held at the Peking Hotel for immoral purposes.

I have had this statement read to me, and I know its contents to be true.

(Sgd.) DONALDINA COMERON.

Subscribed and sworn to before me this 20 day of November, 1913.

(Sgd.) JOHN A. ROBINSON,
Immigrant Inspector.

Copy—LED—11/22/13/. [51]

**[Letter, Dated December 22, 1913, Mr. McGowan to
Commissioner.]**

San Francisco, Calif., Dec. 22nd, 1913.

Hon. Samuel W. Backus,
Commissioner of Immigration,
Port of San Francisco.

Dear Sir:—

In re Ho Shee, *alias* Haw Shee

Departmental Warrant 53575/255—12020/190

On December 10th, 1913, I received through the mails from you copies of affidavits purporting to be signed by Daniel J. O'Brien, Miss Carrie G. Davis and Miss Donaldina Cameron. These affidavits were sworn to on the 20th of November, 1913. It does not appear that they were prepared for use in this present case, and I believe that the originals of another deportation case were taken and copied and these copies were inserted in this record. I am further advised that there is contained in this said record an affidavit by Chief of Police White and two or three other people to the effect that the Peking Hotel has not the reputation attributed to it in the three affidavits mentioned. Inasmuch as the original affidavits

have not been submitted in this case, but merely copies thereof, we would ask, in this matter, for permission to copy the said other affidavits from the record referred to, so that they might be embodied in this case as evidence on behalf of this defendant. I am willing to have these affidavits copied personally, or to defray the expenses of having one of your stenographers copy the same.

In furtherance with my conversation with you, I had expected to be able to close the defense of this case today, but find that I am unable to do so and would therefore ask until the morning of the 24th instant within which to submit the defense. In this connection I wish to state that the defense in this case must cover three specific matters:—1st., the taking into custody of this defendant [52] by the Mission people in November of last year; 2nd, the arrest of the defendant by the Immigration authorities in October of the present year, and lastly, her arrest by the Immigration authorities in November of the present year, besides, of course, covering the method and manner of life in the *interim*. I have most of this evidence prepared and ready to submit, but need the time requested to obtain a little additional evidence and to prepare the brief and exceptions.

Yours very respectfully,

GEO. A. MCGOWAN,

Attorney for Ho Shee, *alias* Haw Shee. [53]

**[Affidavit of Lieu Wee King et al., Taken December
6, 1913.]**

In re HO SHEE, *alias* HAW SHEE
Departmental Warrant 53575/255.
12020/190.

State of California,
County of Siskiyou,—ss.

We, the undersigned Chinese persons, lawfully domiciled within the United States, being first duly and severally sworn, upon our oaths according to law do depose and say:

That we and each of us are residents of Yreka, Siskiyou County, California, and that we have been such residents during all the time hereinafter mentioned.

That the photograph which is hereunto annexed is of Low Kwai and his wife, Ho (or Haw) Shee.

That the said parties came to Yreka to live about during the month of March, 1913, and they resided with the family of Fong Wing at his family home, which is adjoining his general merchandise and drug store, which said business is known as the Chung Wah Tong Co. That the said Low Kwai and his wife Ho Shee continued to reside in Yreka for a period of about 7 months, during which time the said Low Kwai was employed as a cook. That the said Low Kwai and his said wife, Ho Shee, were honest and respectable people, and during their residence in Yreka of about 7 months they conducted themselves in an eminently fit and proper manner. That said Low Kwai was a man of good reputation and habits,

as also was his wife aforesaid, and their residence in Yreka was as man and wife, and they conducted themselves and deported and demeaned themselves as family people of excellent reputation, character and standing. That said Low Kwai and his wife Ho Shee left Yreka together at the termination of said Low Kwai's employment there, which was during the first part of the month of October, 1913. That during all of the time of the residence of said Low Kwai and Ho Shee in Yreka they resided together as husband and wife at the place hereinabove set forth.

That we believe the charge made against Ho (or Haw) Shee being an immoral woman is absolutely without any foundation in truth or in fact, for her life in Yreka would strongly negative any such presumption. The statement that she lived for upwards of three months in Sacramento prior to her arrest there, which we are informed was on the 17th day of October, 1913, is absolutely untrue, for the reason that both Low Kwai and his wife Ho (or Haw) Shee resided in Yreka and were personally present in Yreka for a period of seven months prior to the early part of October, 1913, and they only left Yreka about ten days prior to the said 17th day of October, 1913.

[54]

(Continued on page 2 hereof.)

(Continued from page 1.)

Name.	Address.	Occupation.
(Chinese Character)	(Lieu Wee King)	(Wong Ying Yick)
(Chinese Character)	(Gee Jung)	(Yee Poy)
(Chinese Character)	(Wong Toy)	
(Chinese Character)	(Lee Suey)	
(Chinese Character)	(Wong Lee Foo)	
(Chinese Character)	(Bing Kee)	

Subscribed and sworn to before me this 6th day of Decr., 1913.

[Seal] B. K. COLLIER,
Notary Public in and for the County of Siskiyou,
State of California.

(Two Pictures of Chinese Persons.) [55]

[Affidavit of William Calkins.]

In re Ho SHEE, *alias* HAW SHEE,
Departmental Warrant 53575/255
12020/190.

State of California,
County of Siskiyou,—ss.

We, the undersigned, white residents and citizens of the City of Yreka, County of Siskiyou, State of California, being first duly and severally sworn, each for himself and not one for the other, upon our oaths according to law do depose and say:

That the photograph annexed to the foregoing affidavit contains the likenesses of a Chinese man and woman who resided in Yreka for a period of about 7 months. The man was known to us under the name

of Low Kwai and the woman, who was known as his wife and who lived with him here as such, was known under the name of Ho Shee. That they resided with the family of Fong Wing at the latter's family residence, which adjoins his general merchandise and drug store which is known as the Chung Wah Tong Co. That Fong Wing is a Chinese merchant of this city and has been such for a great many years last past. That he and his family are people of the highest reputation and standing, and we know from our own observation of said Low Kwai and his wife Ho Shee, and the further fact that from living with the said Fong Wing and his family, that the said Low Kwai and his wife aforesaid are also people of good character and respectability, and that their life during the 7 months of residence in Yreka was eminently respectable and praiseworthy. Said Low Kwai, during his residence here, was a hard-working and industrious man and was employed in the capacity of a cook. That said Low Kwai and his wife aforesaid first came to Yreka about during the month of March of this year, and they lived here together until during the first part of October of the present year. That we believe that any charge or imputation that Ho Shee, the wife of said Low Kwai, is an immoral woman, is ill-founded, for her life and conduct at Yreka would negative any such presumption; and the charge that she resided in Sacramento for upwards of three months before the 17th day of October, 1913, is absolutely false, because she resided in Yreka for about seven months prior to her leaving there, which,

as before set forth, was during the early part of the month of October, 1913.

Name.	Address.	Occupation.
William Calkins.		

(Continued on page 2.) [56]

[Affidavit of Ellsworth Tubbs, Taken December 8, 1913.]

In re Ho SHEE, *alias* HAW SHEE,
Departmental Warrant 53575/255.

State of California,
County of Siskiyou,—ss.

I, the undersigned, white resident and citizen of Yreka, Siskiyou County, California, being first duly sworn, upon my oath and according to law, depose and say:

That I have lived for the last 6 years on the adjoining block to Fong Wing:

That they have been quiet good neighbors, and I believe them thoroughly respectable people. I have done some business with them and found them honest and reliable;

That I knew a woman whom I believe to be the woman whom the accompanying photograph represents;

That I saw her many times last summer at the residence of Fong Wing, and was on the same train and car with her when she went South October 8, 1913; that she was always when in my presence, quiet, and I saw nothing that would lead me to believe that she was a bad woman.

ELLSWORTH TUBBS.

Subscribed and sworn to before me this 8th day of December, 1913.

[Seal]

B. K. COLLIER,

Notary Public in and for the County of Siskiyou,
State of California. [57]

(Continued from page 1.)

Name.

Address.

Occupation.

Subscribed and sworn to before me this 8th day of Decm., 1913.

[Seal]

B. K. COLLIER,

Notary Public in and for the County of Siskiyou,
State of California. [58]

**[Affidavit of F. W. Armstrong, Taken December 8,
1913.]**

State of California,

County of Siskiyou,—ss.

The undersigned, F. W. Armstrong, a resident and citizen of the Town of Yreka City, County and State aforesaid, being first duly sworn according to law, deposes and says, that he has read the foregoing and annexed affidavit, and that facts therein contained are correct to his knowledge, with the exception of those referring to one Low Kwai purporting to be the husband of Ho Shee and as to those portions referring to said Low Kwai the said affiant has no personal knowledge, he said affiant having but on one occasion met with said Low Kwai while said party was a resident of the aforesaid Town of Yreka City. Further affiant has to say that said Fong Wing and his family are reputable and respectable people and of good character.

Affiant further states that his occupation is that of Searcher of Records of the aforesaid County and his address is corner of Center and Fourth Streets, Yreka, California.

F. W. ARMSTRONG.

Subscribed and sworn to before me this 8th day of December, 1913.

[Seal] B. K. COLLIER,
Notary Public in and for the County of Siskiyou,
State of California. [59]

[Affidavit of Fong Wing, Taken December 6, 1913.]

State of California,
County of Siskiyou,—ss.

Fong Wing, being first duly sworn, upon his oath according to law doth depose and say:

That he is a resident Chinese person, lawfully domiciled within the United States of America, and that he is a merchant and manager of the firm of Chung Wah Tong & Co., which is a firm engaged in buying, selling, and dealing in general merchandise and drugs at a fixed place of business in the Chinatown of Yreka, California, and that your affiant has been so engaged for many years last past.

That your affiant is a married man, his wife being Wong Shee, and there are, as a result of such marriage, three children, Fong Ah Geow, a daughter, and two sons,—Fong Way Haw and Fong Way Suck, and that your affiant's said family reside with him at his family home which adjoins his said mercantile business.

That your affiant is personally well acquainted

with Low Kwai and his wife Ho (or Haw) Shee. That the said Low Kwai was employed by your affiant as a cook in the said City of Yreka for a period of about seven months, which term of employment terminated during the early part of the month of October, 1913. That during all of this term of seven months the said Low Kwai and his said wife Ho (or Haw) Shee resided in Yreka and lived there with your affiant and your affiant's said family, and the said Low Kwai was employed by your affiant as aforesaid. That the said Low Kwai and his wife (or Haw) Shee are honest, respectable people and during their residence in Yreka they conducted and deported themselves in an eminently fit and proper manner. That the said Low Kwai is a man of good reputation and habits, as also is his wife, and during their residence in Yreka they resided together as man and wife and conducted, deported and demeaned themselves as family people of good reputation and standing. That during the employment of the said Low Kwai as aforesaid he saved almost all of his money and left it on deposit at your affiant's said store, and when he ceased working for your affiant he and his wife got their possessions together and drew down the money which the said Low Kwai had earned and left for Sacramento, where it was the intention of the said Low Kwai to make some investments in Chinese companies engaged in farming and ranching in and about the City of Sacramento and adjacent cities and towns.

That your affiant believes the charge made against said Ho (or Haw) Shee of being an immoral woman is absolutely without any foundation in truth, or in

fact, for her life in Yreka would strongly negative any such presumption. The statement that she lived for upwards of three months in Sacramento prior to her arrest there, which I am informed was on the 17th day of October, 1913, is absolutely untrue, for the reason that I am, as aforesaid, in a position to know, and do know, that both [60] Low Kwai and his wife Ho (or Haw) Shee resided with my family in Yreka and were personally present in Yreka for a period of seven months prior to the early part of October, 1913, and they only left Yreka about ten days prior to the said 17th day of October, 1913.

That the photographs which are annexed to the affidavits which are hereunto attached and which are sworn to by residents of Yreka, are respectively of the said Low Kwai and his said wife, Ho (or Haw) Shee.

FONG WING.

Subscribed and sworn to before me this 6th day of December, 1913.

[Seal]

B. K. COLLIER,

Notary Public in and for the County of Siskiyou,
State of California.

[Affidavit of Wong Shee, Taken December 6, 1913.]

State of California,
County of Siskiyou,—ss.

Wong Shee, being first duly sworn, upon her oath according to law doth depose and say:

That your affiant is a person lawfully domiciled within the United States of America, and is the wife of Fong Wing, the affiant in and to the foregoing

affidavit. That your affiant has had read and explained to her the contents of the affidavit aforesaid of the said Fong Wing, and that she understands the same, and your affiant does, for herself alone and upon her own account and volition affirm the truthfulness of the averments and recitals contained in the affidavit of her said husband, Fong Wing.

In addition to the foregoing your affiant deposes and says that during all of the seven months' residence of the said Ho (or Haw) Shee, the said Ho (or Haw) Shee lived in almost continuous association with your affiant at Yreka, and your affiant therefore knows that she is a family woman of good reputation and character and her habits and tendencies are essentially those of a family woman. Your affiant believes that the said Ho (or Haw) Shee is cruelly and unjustly maligned and falsely accused in the charge which is made against her in this matter.

Subscribed and sworn to before me this 6th day of December, 1913.

WONG SHEE.

[Seal]

B. K. COLLIER,

Notary Public in and for the City and County of San Francisco, State of California. [61]

[Affidavit of Fong Tune et al., Taken November 6, 1913.]

In re HO SHEE, *alias* HAW SHEE,
Departmental Warrant 53575/255.

12020/190.

State of California,
County of Sacramento,—ss.

We, the undersigned persons, lawfully domiciled

within the United States, being first duly and severally sworn, each for himself and not one for the other, upon our oaths according to law do depose and say:

That we are personally acquainted with Low Kwai and his wife Ho Shee, sometimes known as Haw Shee. That for about a week prior to the 17th day of October, 1913, they were residing in the living apartments or lodging quarters back of the store of Yick Soo Tong, which is a firm conducting a Chinese drug and general merchandise business at No. 907 Fourth Street, in the City of Sacramento, County of Sacramento. That the said Low Kwai was living at said place with his wife, the said Ho Shee, during all of said time, and his sojourn in Sacramento was on business matters in connection with the purchase or management of certain farming lands in which an association of Chinese, of which he was one, was interested. That the said Low Kwai and his wife, Ho Shee, are honest and respectable people and during their sojourn in Sacramento they conducted themselves in an eminently fit and proper manner. That the charge or reflection that Ho Shee, sometimes known as Haw Shee, the wife of the said [62] Low Kwai, was engaged in any immoral occupation, or that she was an inmate of any immoral place or connected in any manner with any immoral place during her residence in Sacramento, is entirely without any foundation in fact; but, on the contrary, said Ho Shee conducted, demeaned and deported herself in all respects as a respectable Chinese family woman.

Your affiants do further depose and say that any charge or statement to the effect that Low Kwai's

said wife resided at No. 907 China Alley in the City of Sacramento, is absolutely untrue and is not in accordance with the facts. Low Kwai's said wife was arrested about 9:30 o'clock in the daytime at 907 Fourth Street, in Sacramento, and the circumstances of her arrest have nothing to do with, nor any connection with any house of prostitution or other immoral place, that is, as far as Low Kwai's said wife or Low Kwai himself are concerned.

We desire finally to submit that Mrs. Low Kwai is a woman of good reputation and character, as also is her husband. That the said Low Kwai, during his visit to Sacramento as aforesaid, made daily trips to the adjoining towns and cities in connection with the farming interests that he and his associates were interested in, but during his sojourn there he always returned to Sacramento at night and stayed with his wife. [63]

FONG TUNE—400 I St.,

OY YUEN TONG—404 I St.,

YEE WO CO.—911½ 4 St.,

WONG CO.—921 3d St.,

LEE SUI—228 I St.,

YICK SHUE TONG & CO.—907 4th St.,

Sacramento.

Subscribed and sworn to before me this 6th day of November, 1913.

[Seal]

J. M. PERMAN,

Notary Public in and for the County of Sacramento,
State of California.

(Page 2.) [64]

[Affidavit of Louie Ding, Taken December 11, 1913.]

In re HO SHEE, *alias* HAW SHEE,
Departmental Warrant Case 53575/255.
12120/190.

State of California,
County of Sacramento,—ss.

Louie Ding, being first duly sworn, deposes and says:

That your affiant is a native born citizen of the United States of America.

That your affiant has heard read to him the testimony of James Weaver given at Sacramento before Inspector Robinson on October 17th, 1913 and your affiant is the same Louie Ding mentioned in the said testimony and in connection therewith your affiant does make answer as follows:

That the said James Weaver is a personal enemy of your affiant and the statements made by the said Weaver were in your affiant's belief made thinking that they would injure your affiant. Your affiant does not know the Chinese woman Ho Shee referred to and she has no connection with your affiant now and never has had. She did not live at the place referred to as 410½ alley at any time. This place is leased by your affiant and sublet to different tenants. Your affiant has heard that this Ho Shee had just arrived at Sacramento with her husband from Yreka and that she was stopping at the drug store of Yick Shue Tong with her husband. Your affiant does know that the statement that this woman had

been in the place on the alley for a period of approximately three months to be untrue. She never lived at said place at any time. The place on the alley known as 410 $\frac{1}{2}$ is occupied by white people. The premises referred to however are known as 406.

The said James Weaver has arrested your affiant and the case was thrown out of court and dismissed. I also know that his reputation is bad. He had charges filed against him as a policeman and is not now on the force. His statement that I told him that the premises on the alley was a house of prostitution is untrue for I never told him any such thing. His statement that I described this Ho Shee to him as an inmate of that place is a fabrication pure and simple. Weaver and myself were enemies during all the time in question and I did not and would not have spoken to him under any circumstances and he knows this very well. He has raided my Chinese Family Club and also the premises on the alley jointly I should say about fifty times searching for gambling and made some arrests at different times but never convicted any of the people. Some of the people he took in charge the Captain refused to hold. I merely give these facts to show that the feelings between Weaver and myself were of such a character that any statement that he conversed with me as claimed by him is absurd; and also to show the hostility of Weaver to me.

LOUIE DING.

Subscribed and sworn to before me this 10th day
of December, A. D. 1913.

HARRY L. HORN,
Notary Public in and for the City and County of San
Francisco, State of California. [65]

**[Affidavit of Hoy Sam and Wong Wing, Taken
December 12, 1913.]**

In re HO SHEE, *alias* HAW SHEE.

Departmental Warrant 53575/255.

12020/190.

State of California,
County of Sacramento,—ss.

We, the undersigned, each being duly sworn, and
not one for the other, depose and say: That I am a
bona fide resident of the City of Sacramento, County
of Sacramento, State of California, and have been
for more than one year last past; that I have resided
in the said Sacramento City for more than one year
last past; that I know of my own knowledge that
there are different factions amongst the Chinese peo-
ple in the City of Sacramento, Chinese town; that
Louis Ding is a member of one of said factions, and
that I am a member of one of said factions; that
Police Officer Weaver of the City of Sacramento is
very friendly to one of said factions and very much
opposed to the faction to which Louis Ding is a
member.

HOY SAM.

his

WONG (Chinese Character) WING.

mark

Subscribed and sworn to before me this 12th day of December, 1913.

[Seal]

ARTHUR H. McCURDY,

Notary Public, in and for the County of Sacramento,
State of California. [66]

Subscribing witnesses to signature:

F. J. WHITE.

ARTHUR H. McCURDY.

Wong Wing being unable to write, requested me to write his name, which I did, as above, in his presence and at his direction; he made his signature by the mark; I wrote his name near it; the other witness above named and I witnessed his signature and subscribed our names as witnesses thereto.

ARTHUR H. McCURDY. [67]

[Affidavit of Fong Ming et al., Taken December 12,
1913.]

In re HO SHEE, *alias* HAW SHEE.

Departmental Warrant 53575/255, 12020/190.

State of California,

County of Sacramento,—ss.

We, the undersigned, each being duly sworn and not one for the other, depose and say: That I am a *bona fide* resident of the City of Sacramento, County of Sacramento, State of California, and residing in the City of Sacramento; that I was so residing on the 17th day of October, 1913; that on the 16th day of October, 1913, I occupied a room in a Chinese lodging-house in the premises known as No. 406, in the alley, between Fourth and Fifth, I and J Streets, in the City of Sacramento, California; that said Chi-

nese Lodging-house was conducted by one Louis Gom, and Louis Gom holds the lease to said premises from one Louis Ding, dated the 5th day of November, 1912; that I retired to my room in the said Chinese Lodging-house on the night of October 16th, 1913, and remained in said house during the remainder of said night, and the morning of October 17th, 1913, and there were no women to my knowledge in said house, or occupying any beds therein during said time that I occupied said room, from the evening of October 16th to 9 o'clock A. M. October 17th, 1913, or at the time the said house was searched by Police Officer Weaver, of the City of Sacramento and Immigration Inspector Robinson; that said house is what is known as a Chinese Rooming-house and so conducted; [68] that said house is not a house of prostitution or assignation; that about 9 o'clock A. M. October 17th, 1913, said Officer Weaver and Immigration Inspector Robinson made a raid on said lodging-house, Inspector Robinson, together with two or three Police Officers of Sacramento City, entered the front of said premises and Officer Weaver entered said premises by the back door and they immediately searched said premises and found no women therein; that at the time of said raid I occupied one of the beds in said lodging-house.

That different factions exist amongst the Chinese People in the Sacramento Chinatown, and said Police Officer Weaver appears to be very friendly to the faction opposed to Louis Ding and others and very hostile toward Louis Ding; that on two or more occasions he has arrested Louis Ding and attempted

to convict him of minor offenses, but has failed to do so; that I am not acquainted with the above-named Ho Shee, *alias* Haw Shee, and have never met her on any occasion that I know of; that I have never seen said above-named woman; that I have occupied a room in said lodging-house for a period of about one year and during said one year's time, I never at any time saw the said Ho Shee, *alias* Haw Shee, in or about said lodging-house and premises.

FONG MING.

his

YE (Chinese Character) SING.

mark

his

YE (Chinese Character) BOW.

mark

his

LOUIE (Chinese Character) SUE.

mark [69]

his

LOUIE (Chinese Character) HUNG.

mark

his

FONG (Chinese Character) SUE.

mark

Subscribing witnesses to signatures:

F. J. WHITE,

ARTHUR H. McCURDY.

Ye Sing, Ye Bow, Louie Sue, Louie Hung Fong Sue, each being unable to write, requested me to write his name, which I did, as above in his presence and at his direction; he made his signature by the

mark; I wrote his name near it; the other witness above named and I witnessed his signature and subscribed our name as witnesses thereto.

ARTHUR H. McCURDY.

Subscribed and sworn to before me this 12th day of December, 1913.

[Seal]

ARTHUR H. McCURDY,

Notary Public, in and for the County of Sacramento, State of California. [70]

[Letter, Dated December 10, 1913, George A. McGowan to Chief of Police Johnson, Sacramento, Cal.]

GEORGE A. MCGOWAN,
Attorney and Counsellor at Law,
Bank of Italy Building.
Montgomery and Clay Streets,
San Francisco, California,
Telephone Kearny 3092.

December 10th, 1913.

Chief of Police Johnson,
Sacramento, California.

My Dear Sir:—

In re Ho or Haw Shee, 12020/190
53675/255

Some time in October last one of your officers, a certain James F. Weaver, gave some testimony before Immigration Inspector Robinson, which from the facts presented to me, seems to have been quite far from the truth. I would like to ascertain if this officer is still on your force and if not, whether he was suspended or dismissed or resigned in the face

of charges which I understand were filed against him.

Thanking you for the courtesy of an early reply I beg to remain,

Yours very respectfully,

(Signed) GEO. A. McGOWAN,

Attorney for Ho or Haw Shee. [71]

[Letter, Dated December 11, 1913, Chief of Police Johnson to George A. McGowan.]

COPY.

Office of

CHIEF OF POLICE

of the City of Sacramento.

Sacramento, Cal., Dec. 11, 1913.

Mr. Geo. A. McGowan,

San Francisco, Calif.

Dear Sir:

Re: James Weaver.

Replying to your letter of Dec. 10th requesting information as to the outcome of the criminal charges preferred against Officer Weaver by citizen W. E. Osborne, I beg leave to state that the Prosecuting City Attorney found that he could not introduce the testimony of Osborne, and without it, there was no case, so the Court had to dismiss the matter. Weaver, however, was suspended from duty for a period of 30 days and is now again assigned to his beat.

I note the information contained in your letter as to possible wrong testimony given by this officer before Immigration Inspector Robinson in the case of Ho How Shee.

Relative to this particular point I will say that I

am acquainted with the matter, but I wish to thank you for the tip as it places me in position for a point in the future.

Yours very truly,

(Signed) WM. JOHNSON,

Chief of Police.

(Fisher) [72]

**[Newspaper Clipping from the Sacramento "Bee,"
November 10, 1913.]**

THE SACRAMENTO BEE.

Sacramento, Cal., Monday Evening,

November 10, 1913.

12 pages

James E. Weaver, Patrolman, Who is Accused of
Breaking Up Osborne Home.



Policeman's Photo Found by Hubby.

W. E. Osborne Charges Patrolman James Weaver
Has Broken Up His Home and Meets Wife.

Declaring that he had found a photograph of Patrolman James Weaver of the Sacramento Police Department beneath the carpet in his wife's room,

W. E. Osborne of Woodland Saturday evening caused the arrest of Weaver and his wife, charging them with having improper relations. The offense is an indictable misdemeanor.

Police Judge Christiansen fixed next Wednesday as the date for setting the time of the preliminary examination. Weaver and Mrs. Osborne are at liberty under \$1,000 bail each. C. B. Harris represents them.

Broke Up Home.

Osborne declares Weaver broke up his home.

"We have been married eighteen years and were happy until Weaver, under the guise of a friend, entered our home," said Osborne to-day. "He and I worked together at the Kane & Trainor Ice Company and were friends. I took him into my home as a boarder. Two years ago this month I caught him and my wife in the parlor of my home in loving embrace. They were kissing. I hit Weaver a rap over the head, kicked him out of the house and ordered him not to return.

"A year ago I caught him and my wife together in Capitol Park. I knocked Weaver down.

They Took Assumed Names.

"Weaver and my wife corresponded under assumed names. She would get her mail by general delivery. I found Weaver's picture under the carpet in my wife's bedroom."

Osborne added that he had caused Weaver's arrest when he learned last week that Weaver told friends that in case they wished to talk to him over the telephone to call him up at Capital 207-J, as that was his home. This telephone is listed under Wea-

ver's name, but the address given in the telephone directory, 2525 Thirty-fifth Street, is Mrs. Osborne's home, where she has been living for many months.

Mrs. Osborne, who is 33 years old, has two children, a married daughter 17 years old, and a 14-year-old son.

Woman Says "Spite Work."

Mrs. Osborne declared today that her husband had caused her arrest and that of Weaver through "spite work." She said she would never live with Osborne again.

"He came home drunk several times, and once he beat me up so that I had black and blue marks for several days," said Mrs. Osborne, "He threw me out of the house and threw such of my clothes that he didn't burn, after me."

Denies Charges.

Mrs. Osborne says her relations with Weaver were entirely proper.

Weaver says the charges made by Osborne are without foundation, and induced by spitework.

"Osborne said he would get my star away from me, and this is his method of doing it," Weaver declared.

Weaver was arrested on a warrant late Saturday by Chief Johnson and Inspector Koenig, and he gave up his star at that time. He is under suspension, and will not return to duty until the case is settled.

Whether the charge against Weaver is proved or not, it is said Weaver could be dismissed "for the good of the service." Chief Johnson would make no statement today as to his attitude in the matter.

**[Copy of Article Published in the Sacramento "Bee"
December 11, 1913.]**

Sacramento, Cal., Thursday Evening,
December 11, 1913.

16 pages.

Mrs. Osborne Craved for Patrolman's Juicy Kisses.
W. E. Osborne, Indignant Because James Weaver is
Vindicated by Bliss, Gives Out Love Letter
Written by Wife to Sacramento
Officer.

Declaring the reinstatement of James Weaver as patrolman, in the face of evidence that Weaver and Mrs. Mabel Osborne were on intimate terms, is an outrage, W. E. Osborne of Woodland, and husband of the woman, came to Sacramento to-day to investigate the circumstances surrounding the action of City Commissioner C. A. Bliss in vindicating Weaver.

Osborne not only is irate because he thinks Patrolman Weaver got off easy, but he charges Commissioner Bliss with a breach of faith in not notifying him so that he could submit evidence against Weaver.

Love Letter to Weaver.

Osborne gave out a letter written by Mrs. Osborne to Patrolman Weaver that smacks of clandestine love matters. The letter follows: [74]

Woodland, May 18, 1913.

My Dearest and Only Sweetheart:

Today being Sunday has been quite a lonesome and dreary day for me. Will come just as soon as

I can, as you know I always do that. I can't get there fast enough sometimes or always. Now, don't you misunderstand me what I said about honeying E—— up. Don't get the wrong idea. You know what I meant—nothing what you thought. No. No. No.

I was oh, so glad to get your dear, sweet letter. I read it over a good many times before I burnt it up.

I sure will stick this proposition out as long as things are reasonable for your dear sake. Now, I do so want you to hold that job you have. It is one in which you can always look neat and clean.

Says Husband is Hot Air.

I think E—— is a big bunch of hot air, blowing up all the time. Will be glad to see my dear again, as in twenty minutes after the train pulls out you get homesick to see me.

“Real Good Juicy Kiss.”

Oh! Won't I be glad when I can be with you all the time. That will be better than writing. Whenever I want a real good juicy kiss I will know where to find it, for those kisses are sure sweet. They are the only ones that suit me.

Asks Him not to Beat Her.

You won't never beat me, will you, dear? [75]

Well, honey, I must bring this to a close for this time, and will write you tomorrow. With all my love, hugs and kisses, I am

Your forever,

MABEL WEAVER.

Osborne is Indignant.

"The reinstatement of Weaver as patrolman is by no means a closed incident," said Osborne today. "Weaver has broken up my family, and I propose to see that justice is done.

"The action of Commissioner Bliss in reinstating Weaver came as a stunning blow to me. For weeks past the official has been in possession of evidence that should convince any sane man that Weaver is unfit to wear a police star. In support of this assertion, I offer the extracts from the letter written by my wife to Weaver.

"Bad Faith Shown"—Osborne.

Commissioner Bliss is accused of bad faith by Osborne. The Woodland man says the Commissioner, at a conference two weeks ago, took his address and telephone number in order to communicate with him for the purpose of getting additional testimony.

Shields Wife.

"I have not heard from the Commissioner since that meeting," said Osborne, "and as a consequence I am willing to have this letter published that justice may be meted out to Weaver. My wife is the lesser offender and I have no desire to cause her [76] unnecessary distress. But justice I intend to have."

Makes Other Charges.

Osborne says he has evidence prior to May, 1910, by which he can prove that Weaver visited his home at Sutterville nearly every day, during his absence, and remained several hours.

Weaver Tried to Get Letter.

Weaver has made several efforts to secure the love letter published above from City Prosecutor Cross but without avail. It is now in possession of Osborne, who says he will retain it even though it is addressed to Weaver. He declines to state how it came into his possession.

Mrs. Osborne is suing her husband for a divorce which he declares will never be granted. It is alleged in the complaint that Osborne tore up his wife's clothes and committed other unkindly acts. Osborne admits committing acts of this nature but says they were provoked by presents sent her by Weaver under an assumed name.

Technical Dismissal.

The case was dismissed in the Police Court, but Prosecuting Attorney Cross, in his address, said he believed Weaver guilty beyond doubt. Owing to a ruling of the Supreme Court, the evidence of relations between Weaver and the woman occurring before May, 1910, when such offenses became unlawful, could not be admitted. On this ground the case was dismissed, said the attorney. [77]

[**Affidavit of Ho Shee, Taken December 9, 1913.**]

In re HO SHEE, *alias* HAW SHEE,

Departmental Warrant 53575/255

12020/190.

State of California,

City and County of San Francisco,—ss.

Ho Shee, sometimes known as Haw Shee, being first duly sworn, upon her oath according to law doth depose and say:

That your affiant is a resident Chinese person lawfully domiciled with the United States of America, having arrived at the port of San Francisco on the steamer "Siberia" on October 14th, 1912. That your affiant thereupon made application to enter the United States as the lawful wife of Low Kwai, a native-born citizen of the United States, and thereafter the Commissioner of Immigration for the Port of San Francisco ordered your affiant admitted into the United States as such wife of a native born citizen thereof.

That immediately after landing, as aforesaid, your affiant went with her said husband and the child of your affiant's said husband by a former marriage, and went to live in the Oriental Hotel, at the corner of Clay and Stockton Streets, in San Francisco, California, and continued to reside there until the month of November, 1912, or for the period of about a month. That about 7 o'clock at night, during the month of November, 1912, when your affiant was alone in the room occupied by your affiant and your affiant's husband in the said Oriental Hotel, your affiant was taken, against her will and by force, to the Presbyterian Mission Home on Sacramento Street, by Miss Donaldina Cameron and some of her assistants. That the said Mission people, on entering the said Oriental Hotel, took into custody a Chinese woman who occupied a room two or three rooms away from that occupied by your affiant, and they also took your affiant with them, and your affiant alleges that their action in so doing was entirely unwarranted, because your affiant was a respectable Chinese family woman living in said hotel

with her husband, and your affiant was in her room at the time of her arrest, which, as before stated, was about 7 o'clock in the evening. That your affiant was held in the said Presbyterian Mission for a period of about two months, during which time your affiant was confined therein as a prisoner, she being refused permission to leave said Mission home and being refused permission to even telephone from the said home. That during the confinement of your affiant as aforesaid, your affiant's said husband made frequent and numerous attempts to see your affiant at said Mission home, but on each and every one of said occasions your affiant's said husband was refused permission to see your affiant or to send any word to her, and the said Mission people did not convey to your affiant the information that your affiant's said husband called at the said Mission home to see her, but on the contrary, that your affiant did not learn thereof until after her release as hereinafter stated.

That your affiant has had read and explained to her the testimony given in this matter by Tien Foo Wu, the Assistant Superintendent of [78] the said Presbyterian Mission Home, and has also had read and explained to her the statement made upon the same day by Donaldina Cameron, the Superintendent of the said Presbyterian Chinese Mission Home, and with respect to said statements your affiant denies that she ever sent or caused to be sent any word to the said Presbyterian Mission Home, or to any other home, as alleged in said statements. And your affiant further deposes and states that the re-

puted statements of your affiant in said testimony to the effect that your affiant had been leading an immoral life, or that she had been brought to this country to lead an immoral life, are entirely untrue, and your affiant never made any such statements. Your affiant does not know the Choy Kum referred to in the testimony of the said Tien Foo Wu, and has never heard of the said person prior to the testimony of the said Tien Foo Wu being read to your affiant. Your affiant further denies that the stepson of your affiant was sold to a slave-owner, and denies that she has ever had any conversation with anyone at the said Mission relative to the same, but on the contrary, your petitioner alleges that the said Mission people tried to convince your affiant that your affiant had been brought to this country for immoral purposes and asked your affiant questions seeking to show that your affiant's said stepson had been brought to this country to be sold. And your affiant denies further that she ever stated that she had practiced prostitution in the said Oriental Hotel or any other place. Your affiant denies that the said Mission people have ever heard that your affiant has led an immoral life, save and except that if they did so hear that they heard the same through the agency of interested persons who have self-seeking ends to attain. Your affiant further denies, as testified to by Miss Cameron, that when your affiant was in the Mission Home that she frequently discussed her life in Chinatown as a slave girl, and her hardships in that life, and in this connection your affiant denies that your affiant at any time made any such state-

ments while confined in the said Presbyterian Mission, and denies that she is or ever was a slave girl.

Your petitioner further denies that she ran away from the said Presbyterian Home by climbing over a fence at night, and in this connection your affiant alleges that, your affiant being confined in said mission home as a prisoner for a period of about two months, during which confinement she was not even permitted to use the telephone, nor to have any one of her friends nor her husband to see her, your affiant saw an opportunity to walk out of the front door of said mission home, which front door had inadvertently been left open at about half-past six o'clock at night, and your affiant accordingly walked out of the said door and into Chinatown, which is one-half block distant. That your affiant thereafter found her husband and joined him, and feeling that they would be hounded and persecuted by the Mission people who had held your affiant as a prisoner as aforesaid, your affiant and your affiant's said husband went to a town way up in the mountains, the name of which your affiant did not remember at the time of her examination herein, but which said town was known by the name of Yreka, and that your affiant and her husband resided there for a period of seven months, during which time your affiant's husband was employed as a cook in a drug and merchandise store conducted by Fong Wing, and your affiant resided with her husband and the family of the said Fong Wing in the building adjoining the said store, and your affiant and her said husband continued to reside there as aforesaid for

a little over seven months. That during [79] this time your affiant's said husband and your affiant saved almost all the salary of your affiant's said husband, and when they left Yreka and came to Sacramento your affiant sold some of her jewelry, and, taking the cash into which it was converted, she joined the same with her husband's salary aforesaid and placed the total in a bank at Sacramento within one or two days after her arrival there from Yreka. That your affiant's said husband was looking around Sacramento and the places adjoining for the purpose of investing our money in shares in certain Chinese farming companies, and during his trips in and out of Sacramento on said business your affiant resided in Sacramento in the living apartments or lodging quarters back of the store of Yick Soo Tong, at No. 907 Fourth Street, where your affiant resided with her said husband, and that your affiant continued to reside there for about the period of one week or ten days, when your affiant was arrested in about the middle of the daytime on the street in front of said store.

Your affiant further deposes and says that the testimony given in this matter by the police officer in Sacramento who professes to identify your affiant as an occupant of a house of prostitution for a period in the neighborhood of about three months prior to the date of your affiant's said arrest, was either willful, deliberate perjury on the part of said officer, or is a case of mistaken identity, for the reason that your affiant resided continuously in Yreka during all of the time in question, save and except about

one week or ten days prior to the time of her said arrest and which was the only part of said time that your affiant resided in Sacramento, and that during all of said time your affiant lived, as hereinbefore stated, with her said husband, both at Yreka and Sacramento, as aforesaid, and not otherwise, and that never at any time was your affiant an inmate or an occupant of, or a visitor to or at the said premises referred to in the testimony of the said police officer.

Your affiant further states, upon information and belief, that the testimony of this said police officer is inspired by enmity and hatred towards a Chinese person in Sacramento with whom he has been involved in some kind of litigation, and further, your affiant is informed that the said police officer has since been dismissed or suspended from the police service of Sacramento by reason of the unreliable nature of the service rendered by him, and by reason of the fact that his reputation for truth, honesty, veracity and integrity is bad. That these latter averments with respect to the said police officer are upon information and belief of your affiant, and your affiant desires a further opportunity of presenting more direct evidence upon said matter.

Your affiant further alleges that she has at all times during her residence in the United States been a family woman of good reputation and character; that she has never followed any immoral life nor engaged in any questionable or immoral pursuits, and your affiant desires to condemn most strongly the conduct of the Mission people in this matter

[80] in attempting to persuade your affiant that she had been brought to this country for immoral purposes and in attempting to separate her from her husband.

her

HO X SHEE.

mark.

Subscribed and sworn to before me this 9th day of December, 1913.

[Seal]

HARRY L. HORN.

Notary Public in and for the City and County of San Francisco, State of California.

Ho Shee being unable to write, she made her mark and I wrote her name at her request and in her presence.

HARRY L. HORN. [81]

[Affidavit of Ho Shee, Taken December 20, 1913.]

In re HO SHEE, *alias* HAW SHEE,
Departmental Warrant 53575/255
12020/190.

State of California,
City and County of San Francisco,—ss.

Ho Shee, *alias* Haw Shee, being first duly sworn, upon her oath according to law doth depose and say:

That your affiant makes this supplemental affidavit for the purpose of answering the additional evidence filed against her in this case on December 9th, 1913, said evidence in question consisting of copies of three affidavits made on November 20th, 1913, but which were not incorporated in the record

herein until the 9th of December, 1913.

Your affiant was arrested on the 17th of October and was released on bail on the 21st of October, when she went to reside with her husband in Room No. 16 on the top floor of the Peking Hotel at No. 770 Commercial Street, San Francisco. That this said Peking Hotel is owned by the Chinese Consolidated Benevolent Association, (Chinese Six Companies), and is operated and conducted as a first-class Chinese hotel. That the guests of said hotel are Chinese people of good reputation and character, and while residing in the said hotel they expected to and do conduct and demean themselves as such. That upon my release upon bail I had to go some place to live pending the determination of the charges made against me, and as my husband and myself had not lived in San Francisco for a long time, we accordingly went to this Peking Hotel and both of us were occupying the same room and had our clothing in said room. That my husband sought and received employment as a porter in a saloon in the white man's part of the City of San Francisco and he is not released from his employment until very late at night. That this class of employment is not desired by my husband, nor did I desire that he should have such employment, but in view of the expense that we were under, he had to have some kind of employment and therefore took the first position which he could obtain. That I had been at large upon bail for about 15 days, when, on the night of the 6th of November, at about half-past ten o'clock, some immigration and police officers entered

the said Peking Hotel. I had my door locked and was just about to retire for the night and was in my room alone. They knocked at the door and demanded that I open it, and though I was frightened at the thought of strange men coming to my room I was compelled to open the door for them. I asked them what they wanted and they told me that the immigration officers did not think that the place where I was living was a hotel. Without giving me any further explanation, although I told them that I was released on \$3,000.00 bail and was just living there while getting ready for my case, they took me to jail, where I had to stay the balance of the night and in the morning I was taken to Angel Island where I was kept in detention until the 13th of November, [82] when I was again released.

That though your affiant was detained at Angel Island, as stated, after her arrest in the Peking Hotel, for a number of days, she was not examined or interrogated by the Immigration officers, and for said reason there is no statement of any kind by your affiant made immediately after her last arrest and before her release as aforesaid.

That your affiant and her said husband have done and are doing everything in their power to present the true facts to the Department relative to the life of your affiant in this country, and your affiant desires again to reiterate that she has never since her entry into the United States followed any immoral occupation nor engaged in any immoral pursuits, but

on the contrary, has lived as a respectable Chinese family woman.

her
HO X SHEE.
mark.

Subscribed and sworn to before me this 20th day of December, 1913.

[Seal] HARRY L. HORN,
Notary Public in and for the City and County of San Francisco, State of California.

Ho Shee being unable to write, she made her mark, and I wrote her name at her request and in her presence.

HARRY L. HORN. [83]

[Affidavit of Low Kwai, Taken December 20, 1913.]

In re HO SHEE, *alias* HAW SHEE,
Departmental Warrant 53575/255
12020/190.

State of California,
City and County of San Francisco,—ss.

Low Kwai, being first duly sworn, upon oath deposes and says:

That your affiant is a native-born citizen of the United States of America and such fact has been the subject of examination and has been so adjudicated, the last occasion being upon the return of your affiant from China, when your affiant was incoming passenger on the Steamship Siberia, which arrived at the Port of San Francisco on the 14th day of October, 1912, and your affiant was thereafter ordered admitted into the United States by the Com-

missioner of Immigration for the Port of San Francisco as such native born citizen thereof. That your affiant was accompanied on said trip by his wife, Ho Shee, sometimes called Haw Shee. That after due and appropriate investigation and examination by the said Commissioner of Immigration your affiant's said wife was permitted to enter the United States as the lawful wife of a native-born citizen of the United States, and your affiant was also accompanied on said trip by your affiant's baby son, the stepson of the said Ho Shee. That immediately after the landing of affiant, as aforesaid, he went to the Oriental Hotel in San Francisco and made arrangements there to reside in said hotel with his wife and said child, and after their landing as aforesaid they went to said hotel and resided there with your affiant, and after so residing there for the period of about a month, at the expiration of said time and at about 7 o'clock in the evening, while your affiant had his said son out for a walk, Miss Cameron, of the Presbyterian Mission and others acting in concert with her, entered the said Oriental Hotel and forcibly took his said wife, Ho Shee, away with her to the said Mission. That your affiant was not present at the actual time that this act was committed, and as soon as he found out what had been done your affiant went immediately to the said Presbyterian Mission, and this he did not only once, but on numerous occasions thereafter, and asked to see his said wife, but on each and every one of said occasions he was refused permission to see his said wife and was told that his wife did not want

to see him, and no message or word of any kind was ever delivered to your affiant, notwithstanding the fact that your affiant's said wife made repeated and numerous attempts to have some word delivered to your affiant.

That after your affiant has been robbed of his wife by these Christian women, as aforesaid, your affiant was left with a little child upon his hands, and being unable to personally take care of the infant, he took it and left it with the family of his friend, Wong Joe Sai, with whom he made arrangements to pay for the taking care of the child for affiant. That after a lapse of about two months' time your affiant's said wife managed to escape from the said Presbyterian Mission, where she had been incarcerated as a prisoner, and made [84] her way into the Chinatown District of San Francisco, where your affiant joined her. That well knowing that the said Mission people would continue their operations against your affiant's said wife, and realizing that these Mission people would leave no stone unturned in their fight against the wife of your affiant in their endeavor to gain control of your affiant's said wife for their own ends and purposes, and your affiant and his wife being very devotedly attached to one another, your affiant and his said wife decided that the best thing for them to do would be to get out of the way of the Mission people, and as your affiant secured a suitable position in the country, he took his said wife and went to Yreka, where your affiant was employed as a cook by Fong Wing, the manager of the store of Chung Wah Tong & Co., and your

affiant was so employed in said store for the period of about seven months, during which time your affiant and his said wife resided with Fong Wing's wife and children, the wife of the said Fong Wing being named Wong Shee and his family consisting of three children,—a daughter and two sons, and your affiant and his said wife resided with them in a building adjoining the said store for a period of about 7 months, during which said time your affiant and his said wife did not leave Yreka at any time. That your affiant and his said wife went to Yreka in March and left Yreka on the 8th day of October, 1913, for Sacramento.

That at the time the application for the issuance of a warrant in this case was made, stating, from an anonymous source, that your affiant's wife was practicing prostitution in the Oriental or the Republic Hotel of San Francisco, your affiant's said wife was in Yreka, and was not in San Francisco at all during said alleged time. That your affiant alleges and is firmly convinced in his mind that the source of the anonymous communication referred to was inspired directly or indirectly by people connected with the said Presbyterian Mission and was incited by such anger and hostility towards the wife of your affiant because of her escape from their said Mission, and your affiant alleges that had their act in the premises been prompted by respect of the law, and had they believed sincerely the truth of the representations made, that they would immediately have given the information which would have resulted in the application of the warrant of arrest; and your affiant

alleges upon information and belief that because the said Mission people did not believe that your affiant's wife had violated the law, and that they had not sufficient or any evidence and proof thereof, that they therefore refrained from applying and did not apply for or ask for a warrant of arrest, and in this connection your affiant further alleges upon his information and belief that the said warrant of arrest was only applied for after the said Mission people realized that they could not find the wife of your affiant and that they therefore desired to seek out their revenge upon her.

That while your affiant was employed at Yreka he and his said wife saved all of their money, and upon coming to Sacramento your affiant's wife converted some of her jewelry and wedding presents into cash, and, together with the said savings, deposited the entire sum in a bank at Sacramento; and while in Sacramento your affiant resided with his said wife in the rear portion of the drug store of Yick Soo Tong, at No. 907 Fourth Street, and your affiant was traveling around in the vicinity thereof, looking around at different farming projects in close proximity to Sacramento, and which Chinese companies were forming to cultivate the same, said farming enterprises being operated on shares, in which [85] different Chinese each invest a small amount of money and share proportionately in the final yield of the crops, and it was when your affiant was in Sacramento for such purpose and after he had resided there for a little over a week, that, without any cause or provocation, your affiant's said wife

was taken into custody by the Immigration and police officers of Sacramento. Your affiant's said wife was arrested about in the middle of the day-time, on the street right in front of the drugstore above mentioned. That she was not engaged in following any immoral pursuit, nor had she been, and that her arrest was prompted solely as a result of a campaign of police persecution which was being waged in Sacramento by a certain police officer there by the name of James Weaver, who was an enemy of a certain faction of Chinese to which a Chinaman by the name of Louie Ding belonged, and that the identification of your affiant's wife by the said police officer, James Weaver, as having been an inmate of a house of prostitution of Sacramento for a period of three months prior to her arrest, was absolutely false, and his statement or charge to that effect was either plain, bald perjury on the part of the said officer, or else he was mistaken in his identity, for the reason that your affiant's said wife had been living with your affiant continuously for upwards of seven months prior to the date of her said arrest, and all but nine days of which time was spent in the City of Yreka as aforesaid.

That after the arrest of your affiant's said wife, she was brought to San Francisco and detained at the Immigration Station for a few days until your affiant could arrange for her release upon bond, and upon her release she and your affiant went to live together at the Peking Hotel at No. 770 Commercial Street, in the City of San Francisco. That this

Peking Hotel is owned by the Chinese Six Companies of San Francisco. The said land upon which said hotel is situated was, before the fire, occupied by the building in which the said Chinese Six Companies had their headquarters. The said property is now occupied by a building which is conducted and operated as a first-class hotel at the present time, and was so operated and conducted at the time your affiant and his said wife lived there, as aforesaid, and that the statement contained in affidavits filed herein to the effect that Louie Quong is the manager of the said hotel is totally and positively false, for the reason that the said hotel is managed by *Mar Hing Yee*, a Chinese of very high standing in this community who was formerly the vice-president of the Ning Young Co., which is one of the Chinese Six Companies. The charge contained in certain affidavits filed herein against your affiant's said wife to the effect that the said Hotel Peking has the reputation of being a place where Chinese prostitutes gather, and where prostitution is practiced, is entirely at variance from the facts, because the said hotel positively has not such a reputation and it is not operated or conducted as a house of questionable character, and your affiant alleges that the affidavits filed in this case to the contrary are inspired by malice and hatred, are not based upon the facts of the matter, and are made by persons having a deep interest in besmirching the reputation of Chinese whom they do not find pliable in their hands.

That your affiant, since the arrest of his said wife, has resided with her in room No. 16 in the said

Peking Hotel, and your affiant's personal effects and clothing have been and are in said room with those [86] of your affiant's said wife. That when your affiant came to San Francisco, after the arrest of your affiant's said wife, he sought employment and obtained the first situation which he could obtain, which is that of a porter in a saloon removed from the Chinese district of San Francisco, and it is for that reason that it is a late hour in the night that your affiant finishes his work and is unable to return to his home until late at night. That your affiant did not seek to establish a permanent residence in San Francisco for his wife and himself for the reason that he realized that his wife would be the object of persecution by the said Mission people as long as she remains in San Francisco, and it was therefore the desire on the part of your affiant and his said wife to take up their residence away from San Francisco in a locality so small, so far as Chinese population is concerned, that the method and manner of the life of your affiant and his wife would be as an open book and which all might know was above reproach. That the action of the Immigration authorities in taking into custody the wife of your affiant, and in forcibly taking her from our room in the Peking Hotel, was entirely without any just cause or provocation whatsoever.

That the plan of campaign carried on by the Mission people in obtaining possession of young Chinese married women, has been demonstrated many times in the past, when they secure the annulment of their marriages and then, under their supervision, have

new marriages contracted by people who are well able to defray the expenses. That there are many instances of such annulment proceedings in the Superior Court of the City and County of San Francisco. While it may be true, in some instances, that such action on the part of the Mission people is for the best interests of the parties concerned, it does not follow that such is always the case, and in their zeal, your affiant alleges, that they are often carried beyond the limits of justice, and do work positive injury and injustice.

That your affiant and your affiant's said wife are very greatly devoted to one another and desire to be let alone and freed from the persecution and prosecution to which they have been subjected, so that they might continue to live peaceably together as man and wife.

The statement contained in the affidavit of Miss Cameron and that of her assistant superintendent in said Presbyterian Mission to the effect that your affiant's wife was practicing prostitution in the Oriental Hotel immediately after her landing here, is ridiculous and absurd. The Oriental Hotel is a respectable hotel and is conducted and operated as such; and your affiant further states that your affiant's said wife, after being landed, was living in San Francisco in the said hotel but about one month prior to her being taken into custody by the said Mission people, and during all of said time her life was respectable in every way, notwithstanding the statements contained in the said affidavits to the contrary. Your affiant believes that it was the intention

of the said Mission people to try and persuade the wife of your affiant to lend herself into being a party to the annulment of the marriage existing between your affiant and his said wife, under the promise of the said Mission people to obtain a very rich husband for her, and your affiant further alleges that this [87] self-elected position of passing upon the private life of Chinese people, which is assumed by the women in charge of these missions, is in the opinion of your affiant, contrary to every principle of American justice.

LIM GIN.

Subscribed and sworn to before me this 20th day of December, 1913.

[Seal]

HARRY L. HORN,

Notary Public in and for the City and County of San Francisco, State of California. [88]

[Affidavit of Gee Sing Sam, Taken December 22, 1913.]

State of California,

City and County of San Francisco,—ss.

Gee Sing Sam, being first duly sworn, deposes and says:

That he is a resident Chinese merchant lawfully domiciled in the United States of America, and that he is at present, and during all of the times hereinafter mentioned has been, the Secretary of the Chinese Consolidated Benevolent Association, more commonly known as the Chinese Six Companies. That this institution is a quasi Governmental body, composed of the representatives from seven different Chinese companies, the presidents of which are ad-

mitted into this country on Officials' Certificates issued by the Chinese Government and honored by the Government of the United States, and these presidents are therefore accredited Chinese officials.

This said Association is the owner of a certain piece of real estate on Commercial Street now known as No. 770, in the City of San Francisco, and on this piece of property the said Association has erected a building which is now occupied and known as the Peking Hotel.

That when your affiant was elected to the office of Secretary of the said Association the said building had been completed and was vacant for some time, when your affiant took up with the governing bodies of the said Chinese Six Companies the question of renting the said building, and your affiant suggested to them the proposition of advertising in the Chinese papers and calling for the submission of bids from any person who might desire to rent the building aforesaid, such notice specifically providing that the said building would have to be used for legitimate and lawful purposes, and such a notice was accordingly published. About May 4th these bids were submitted at a regular open meeting of the said Association, and upon this matter being taken up there were six different bids submitted, the highest of which was that submitted by Mar Hing Yee, who was then the vice-president of the Ning Young Co., which is one of the Chinese Six Companies. Mr. Mar Hing Yee is a Chinese gentleman of the highest reputation and standing. The bid submitted by him was for \$123.60 per month. The other bids sub-

mitted were lower than that of the said Mar Hing Yee. It was expressly stipulated and understood by all those who submitted bids that this building would have to be occupied for legitimate and lawful and honorable purposes, and it was so understood, and said building was leased upon such expressly understood terms and conditions. Our Association would not under any circumstances or conditions consent to the occupancy of our building for immoral purposes. Such offers have been made to us at a rate of rental two or three times in excess of that which we are now receiving, but our Association [89] refused to entertain any such proposition as the occupancy of our Association and Governmental building for immoral purposes. The said Mar Hing Yee opened up the said building and premises as a hotel under the name of the "Peking Hotel."

GEE SING SAM,

Secretary of the said Chinese Consolidated Benevolent Association, Commonly Known as the Chinese Six Companies.

Subscribed and sworn to before me this 22d day of December, 1913.

[Seal]

RICHARD H. JONES,

Notary Public in and for the City and County of San Francisco, State of California. [90]

**[Affidavit of Mar Hing Yee, Taken December 22,
1913.]**

In re HO SHEE, *alias* HAW SHEE,
Departmental Warrant 53575/255,
12020/190.

State of California,
City and County of San Francisco,—ss.

Mar Hing Yee, being first duly sworn, deposes and says:

That your affiant is at the present time the lessee of the Peking Hotel at No. 770 Commercial Street, San Francisco, California.

With respect to the said hotel, your affiant declares that the said property and building belongs to the Chinese Consolidated and Benevolent Association, more commonly known as the Chinese Six Companies. That the said organization advertised in the Chinese papers for people desiring to rent said building to submit their bids, which said bids would be opened at a stated meeting of the said Association. Desiring to lease said building, your affiant submitted a bid for \$123.60 per month. There were four or five other bids submitted and upon their being opened it was ascertained that the bid submitted by your affiant on the lease of said building was the highest, and the lease thereof was thereupon awarded to your affiant.

That it was expressly stipulated, understood and agreed, prior to the submission of the bids, that the building must not be used for any immoral, illegitimate or unlawful purposes, and in this connection your affiant declares that if the said building could

have been used in any other wise its rental would have been two or three times that obtained. After obtaining the lease to said building your affiant caused the same to be furnished and fitted up and opened as the "Peking Hotel," and it is to-day one of the first and highest classed hotels in the Chinese district of San Francisco, and it is not now and never has been used as a place for prostitution for Chinese, nor has it had the reputation of being a place where Chinese gather for immoral purposes, nor is Louis Quong reputed to manage the same, nor has he any interests in or connection with the said hotel in any way, manner, shape or form.

That at the time of submitting the bid of your affiant herein your affiant was the vice-president of the Ning Yung Co., which is one of the Chinese Six Companies, and as such Chinese official your affiant has always strived and does now strive to operate, maintain and conduct the said hotel as aforesaid, on a legitimate and honorable basis and as a Chinese family hotel. That the woman above described, Ho Shee, and her husband, Low Kwai, rented room No. 16 in the said Peking Hotel about the 21st day of October, 1913, and do now and have ever since occupied the said room. That on the 6th day of November, 1913, some immigration and police officers entered the said Peking Hotel and went through it and found Ho Shee in her room alone. The hour was about 10:30 at night. She was taken away by the officers and was held [91] at the Angel Island Immigration Station until the 13th of November, 1913, when she again returned to the said hotel and

has since been living there with her said husband, Low Kwai. That during the time that the said Ho Shee has been residing at said Peking Hotel with her said husband she has deported and demeaned herself as a Chinese family woman of good reputation and character, and the said Ho Shee has not been engaged in any immoral occupation or pursuit in the said Peking Hotel, for such an occupation or pursuit would not be tolerated by the management of the said hotel, nor would it be condoned or overlooked, and our surveillance is such that we know that she has lived as a Chinese family woman of good reputation and character while in our said hotel.

(Chinese Character.)

Subscribed and sworn to before me this 22d day of December, 1913.

[Seal]

RICHARD H. JONES.

Notary Public in and for the City and County of San Francisco, State of California. [92]

Exceptions and Protests [Taken and Made by Mr. McGowan].

In re HO SHEE, *alias* HAW SHEE,
Departmental Warrant 53575/255,
12020/190.

EXCEPTIONS AND PROTESTS.

The regulations of the Department providing that the exceptions and protests of counsel should not encumber the record of the hearing, but should be filed in a separate statement, we now therefore, in compliance with said regulations, submit the following exceptions and protests:—

1st. We desire to protest to the denial of the right of counsel to the defendant on the 20th day of October, 1913, when Tien Fuh Wu and Donaldina Cameron were examined upon behalf of the Government without permitting the defendant to be present and without permitting her to be represented by an attorney at said examination, and we therefore, for said reason, move to strike from the files the examination of each of the said witnesses, and should the said motion to strike out not be granted, we desire then to protest against this case being closed without setting a time when the said two witnesses might be examined, so that the defendant might have an opportunity of being present and represented by her counsel.

2d. We desire to protest in this matter to the detention in custody of the said defendant from October 17th, 1913, to October 21st, 1913, without arraigning her under the warrant of arrest which the immigration officials had in their possession at the time the said defendant was arrested. We desire to protest to the injury occasioned the defendant by the failure to arraign her and accord her the right of attorney immediately after her arrest. We desire to protest at the action of the immigration officials in examining witnesses and taking evidence against the defendant herein after they had her in custody and while they withheld the right of counsel from her.

3d. We desire to protest to the taking of the defendant into custody on the 6th of November, 1913, and her being retained in custody until the 11th of November, 1913, by the said Immigration officials,

notwithstanding the fact that the said defendant was, prior thereto, at liberty upon a bond, as provided by the Secretary of Labor in the said warrant of arrest.

4th. We desire to protest to the incorporation in the record herein of the testimony of James Weaver, taken in Sacramento on the 17th day of October, 1913, and we desire to request that a hearing be set in this case at Sacramento, so that the defendant might be accorded the opportunity of being present with her counsel for the purpose of cross-examining the said witness James Weaver upon behalf of the defendant, and should such request be refused, we desire to except thereto and then request that said hearing be set so that the said witness, James Weaver, might be examined on behalf of the defendant, and we desire finally in this matter to protest against said [93] case being closed without according the defendant an opportunity to question said James Weaver upon the subject of his identification of this defendant as being an inmate of a house of prostitution at Sacramento for upwards of three months, when on the contrary the facts are, and as disclosed by the evidence submitted upon behalf of the defense, that the said defendant was not in Sacramento but for about nine days prior to her arrest on the 17th day of October, and therefore could not be the person whom the said witness, James Weaver, had in mind when giving his said testimony, and we desire to protest to the case being closed without an opportunity being accorded the defendant and her counsel to examine the said James Weaver as aforesaid, or in some way or manner having him examined upon the point in

question in the light of the evidence submitted by the defendant herein.

5th. We desire to protest to the injury sustained by the defendant herein by reason of the telegram transmitted on the 7th day of November, 1913, by the Commissioner of Immigration for the Port of San Francisco, wherein he states to the Department as a "fact" the following: "Because of the fact that alien violates law pending adjudication of her case," when no evidence had been submitted in this case showing that the defendant had violated the law pending the adjudication of her case.

6th. We desire to except and protest to the incorporation in the record herein of the copies of affidavits of Daniel J. O'Brien, Miss Carrie G. Davis and Miss Donaldina Cameron, which said affidavits were dated November 9th, 1913, and were withheld or not in fact submitted in this case until December 9th, 1913, and we desire to protest at this evidence being so taken and so incorporated in the record herein at a time when the defendant was, under the regulations, accorded the right of counsel, and by such a method of procedure preventing the defendant or her counsel from being present at the taking of the testimony of the said three witnesses and safeguarding the rights and interests of the defendant herein at the examination of the said witnesses, and we therefore move that the said affidavits be stricken from the files, and, if said motion be not granted, that a time and place be set and the defendant or her counsel notified thereof, so that the said witnesses may be cross-examined as to the subjects contained

in their said affidavits, and if said examination be not allowed we desire to reserve an exception thereto and then request that the defendant be permitted to examine upon her own behalf the said witnesses for the purpose of showing that the said defendant is not known by any of the said witnesses to have practiced prostitution, or violated the Immigration laws, as alleged by said Commissioner in his said telegram, and for the purpose of showing further that the said Peking Hotel is known and reputed to be a Chinese family hotel of good reputation, and for the purpose of showing further that the said witnesses have no information within their knowledge detrimental to this defendant on the issues herein joined against her, and we desire finally to state that if the request contained in the first paragraph of our letter of December 22d herein be not complied with, we desire in that event to protest to the action of the said Commissioner in preventing the defendant the opportunity of presenting the evidence therein requested.

[94]

In finally submitting these protests and exceptions, we desire to except to the rule of practice enforced in this case which compels the defendant to submit her evidence in her case in opposition to the charge made against her in the form of affidavits, maintaining and contending therein that such a course and class of procedure prevents her from a fair and adequate opportunity of presenting her defense, and prevents the full value of her defense from being comprehended by the Department, and we desire further to protest to the class of hearing which

the Commissioner and the Department have elected in this matter, to present the case to the Government by affidavits and oral examinations in such method and in such manner as to prevent the defendant from any opportunity to examine or cross-examine said Governmental witnesses, and by electing to examine their witnesses orally while they withhold the right of counsel from the defendant herein, and submit the evidence of their witnesses by affidavits after they accord the right of counsel to the defendant, thus preventing the defendant from a fair and adequate opportunity of testing the value of the evidence of the said witnesses and showing its true worth and value to the Department.

Respectfully submitted,

GEO. A. McGOWAN,

Attorney for Defendant herein, Ho Shee, *alias* Haw Shee. [95]

Brief on Behalf of Defendant.

In re HO SHEE, *alias* HAW SHEE,
Departmental Warrant 53575/255
12020/190.

It is not the desire of counsel to overburden the Department with any lengthy presentation of the issues involved in this case, but it will suffice to briefly call attention to the principal points involved.

This defendant arrived in the United States in October, 1912, and immediately after her landing she went to live in the Oriental Hotel with her husband, where she remained for the period of one month. According to the present testimony of the Mission people she was then rescued from a life of immoral-

ity, and as a basis for that assertion the Mission people state that while the defendant was in the Mission home she admitted to them that she had been leading a life of shame prior to being taken to the Mission, and as a further basis of their testimony on this point they recite the circumstances under which they found the woman in the Oriental Hotel, which convinced them that she was practicing prostitution there. As opposed to this, the defendant denies that she ever made any such statements as are attributed to her. In this regard it might be well to call attention to the fact that Miss Cameron does not speak the Chinese language and this defendant does not speak the English language, so that this issue is narrowed down to the conflicting statements of two Chinese women,—the one the defendant, and the other the Assistant Superintendent of the Chinese Mission. Attention is particularly directed to the affidavits of the defendant and her husband, in which they recite that the wife was taken against her will and by force from her husband's home and was kept in the Mission for over two months as a prisoner and in close confinement, in this, that she was not permitted to go out of the Mission, was not permitted to send any message from the Mission, nor to use the telephone therein, nor was she permitted to see any persons who called there to see her, and that finally, when a suitable opportunity presented itself and a door of the Mission was unguarded, she simply walked out of the Mission and rejoined her husband. If this woman was a violator of the Immigration law it was the duty of

the Mission people to have immediately so informed the Government officials. The fact that they did not do so is evidence of some motive of their own in the premises. We believe that the facts are sufficient to show that if the Mission people were desirous of upholding the law they would have reported this case immediately and a warrant would have been asked for, and we believe that it was because the facts did not so warrant that no such application was made.

The Oriental Hotel is a Chinese hostelry well known as a family hotel and it advertises as such in the Chinese daily papers. That clandestine acts of immorality may occasionally be committed in any hotel must of course be conceded, but because some such instances [96] may be disclosed is no reason why the hotel itself should be classed as a Chinese brothel or house of assignation, particularly when it is well known that the facts do not justify such a condemnation.

This defendant was actually arrested in Sacramento on the 17th of October, 1913. This arrest took place at about half past nine o'clock in the morning at No. 907 Fourth Street, just in front of the store of Yick Soo Tong, in the rear of which the defendant had been living with her husband. There are no circumstances shown in the record which connect this defendant in any way with an immoral house in Sacramento, nor any deeds of immorality in Sacramento, excepting as set forth in the testimony of a policeman by the name of James Weaver. This policeman is so thoroughly discredited that his testi-

mony is scarcely worthy of serious consideration. The defendant has shown by an abundance of evidence that she has resided in Yreka for upwards of seven months before her arrest, and that she was in Sacramento for only nine days prior to her arrest. This is particularly shown by the affidavit of Elsworth Tubbs, of Yreka, who knew the defendant in Yreka and saw her many times there, and was upon the train with them when they left Yreka for Sacramento upon the 8th of October, 1913, and it is also shown by a number of witnesses from Yreka, white as well as Chinese, that the defendant resided in Yreka for upwards of seven months prior to the 8th day of October, 1913, thus showing conclusively that the testimony of Policeman Weaver is either willful and deliberate perjury or he has made a mistake in the identity of the defendant. There is further shown, as affecting the credibility of Weaver, the fact of there being different Chinese factions in Sacramento, and that he is very friendly to one faction and has caused the arrest of a member of the other faction whom he has been fighting, and it is further shown that he was suspended from the police force of Sacramento under most revolting circumstances. The class and caliber of this police officer is quite graphically set forth in the newspaper clippings of the "Sacramento Bee," which are submitted in the record. The further testimony submitted from Sacramento shows that for the eight or nine days that the defendant actually resided in Sacramento she was living a proper and upright life.

With respect to the defendant having been taken

into custody at the Peking Hotel in San Francisco, we desire to point out that the record is absolutely silent and contains no evidence that the defendant was practicing prostitution or engaged in any other immoral pursuits in the said Peking Hotel. This defendant did live in San Francisco and when she was released upon bail the most natural thing for her and her husband to do was to go to a hotel and establish their temporary abode until this case was disposed of, and this action they accordingly followed. The affidavits of Police Officer O'Brien, Miss Cameron and Miss Davis are very shrewdly drawn and they do not set up or deny that the Peking Hotel carries on a straight, legitimate hotel business, because it is well known that they do conduct a straight and legitimate hotel business; but these affidavits simply recite that some Chinese women gather there and engage in immoral pursuits. This is not a showing that this defendant followed such an objectionable course, nor is it a showing that said hotel does not conduct a legitimate hotel business. The greatest hotels in the world are liable to be occasionally imposed upon, because the very [97] nature and class of their calling is such that they are open to the public and must receive those who apply for quarters, unless they know positively some good reason why they should close their doors to such an applicant, and in fact they would be liable in damages if they did refuse to receive a person without good cause.

The whole showing against this defendant seems to savor very much of spite-work and to be the result of the disappointment of the Mission people in not

being able to keep this defendant in their Mission so that they could work out their own designs with her, and we submit that their interest in this case and the fact that they did not report the case during the two months that the woman was held a prisoner in their Mission, and that it was not so reported until after they realized that they could not find the woman, shows that their action in the premises was prompted by malice or over-zealousness. It is not necessary to charge that the lady at the head of this institution does work of this character, for it is well known that there are many over-zealous workers connected with these institutions, and others who seek to curry favor in connection with it, all of whom are only too glad to render services which might be of benefit to their home.

In finally submitting this case, we express the firm belief that there is no evidence contained in this record which is free from suspicion and sufficiently clear to justify a finding adverse to this defendant. The testimony of police officer Weaver is discredited and the man himself apparently unworthy of belief and utterly devoid of character. The testimony of Miss Cameron relative to the admissions of this defendant while confined in the Mission, should not be considered, because Miss Cameron does not speak Chinese and these admissions would have to come through her interpreter, Miss Wu, which leaves the question as to whether or not these admissions were made as a matter of veracity between these two Chinese women. If it is said that the defendant is interested, it might with equal propriety be said that

this Mission interpreter is interested, and this examination of Miss Cameron and Miss Wu are further objectionable in that they do not show the circumstances under which this defendant was arrested, so that the Department could determine whether her surroundings were improper. Their statements contain nothing but conclusions and opinions of these two women, without giving the facts, if any, upon which they are based. We contend that the defendant is unfairly treated in this, and that the Department should draw its own conclusions and form its own opinions, and not be governed by those already made by interested witnesses. In other words, we contend that in such serious matters facts alone should be given so that the Department may therefrom form its own conclusions.

In conclusion we desire to state that we believe that the warrant of arrest should be quashed and this defendant restored to her husband.

Respectfully submitted,

GEO. A. MCGOWAN,

Attorney for Defendant, Ho Shee, *alias* Haw Shee.

[Letter, Dated January 2, 1913, Mr. McGowan to
Commissioner.]

San Francisco, Calif., January 2d, 1913.

Hon. Samuel W. Backus,
Commissioner of Immigration,
Port of San Francisco.

Dear Sir:

In re Ho. Shee, *alias* Haw Shee,
Department Warrant No. 53575/255
12020/190.

Subject to all of the protests, exceptions and objections contained in the papers filed with you in the above-entitled matter upon the 24th of December, 1913, I desire to submit in addition thereto, and as part and parcel of the evidence upon behalf of the defendant therein, the joint affidavit of fourteen different affiants, attesting the character of the Oriental Hotel at No. 856 Stockton Street, and the Peking Hotel of No. 770 Commercial Street, San Francisco, and also attesting the character and reputation of the said Ho Shee and her husband Low Kwai. This affidavit is submitted in duplicate, one copy for your files and one copy to be transmitted to the Department with your record.

There is also submitted as an exhibit in this case, a copy of the Chinese newspaper known as the "Chinese Republic Journal," of the issue of November 1st, 1913, which is some days prior to the date of the arrest of the defendant in the Peking Hotel. This paper carries advertisements of both the Oriental Hotel [99] and the Peking Hotel, which are

involved in this case. The two advertisements referred to are marked in red ink.

Encls.

Yours very respectfully,

GEO. A. MCGOWAN,

Attorney for Ho Shee, *alias* Haw Shee, Defendant
herein. [100]

**[Affidavit of Wong Leung et al., Taken December
30, 1913.]**

In re HO SHEE, *alias* HAW SHEE,
Department Warrant No. 53575/255,
12020/190

State of California,
City and County of San Francisco,—ss.

We, the undersigned Chinese persons, residents of the City and County of San Francisco, State of California, being first duly and severally sworn, each for himself and not one for the other, upon our oaths according to law do depose and say:

That we have personal knowledge of the Oriental Hotel at No. 856 Stockton Street, San Francisco, California. That the said hotel is conducted and operated as a hotel for Chinese families and was so conducted and operated during the months of November and December, 1912, and has since been so conducted and operated. That we are personally acquainted with Low Kwai and his wife Ho Shee, and we know that they resided together as man and wife with a child of the husband by a former marriage in the Oriental Hotel for the period of about one month, which was right after the landing of said Ho Shee in the United States. That the said parties lived

together in said building as man and wife and the room which they occupied in said Oriental hotel was occupied for family purposes. That the claim that said Ho Shee lived in said hotel and there followed an immoral life is an untruth, and further she was only in said hotel about a month after her landing before she was abducted by the Mission people. The said Oriental Hotel is a well known Chinese family hotel and is quite extensively advertised as such hotel. That your affiants also have personal knowledge of the Peking Hotel, at No. 770 Commercial Street, That the said Hotel Peking is a modern, well known Chinese family hotel which has only been in operation for a few months. Any charge that the said Hotel Peking is a place where Chinese prostitutes gather and carry on their business is untrue, because the said hotel is conducted and operated strictly as a Chinese family hotel. That we know that since the latter part of October and the first part of November, 1913, the said Ho Shee and her husband have been residing in the said Hotel Peking, and that they have been living there, respectively, as man and wife, notwithstanding any charge that may be made to the contrary.

Your affiants further depose and state that both Low Kwai and his wife, Ho Shee, left San Francisco shortly after Ho Shee's escape from the Mission, and they did not return to San Francisco until October of the present year. And that during the months of March and April, when it was reported that Ho Shee was practicing prostitution in the Republic or Oriental Hotels, she was in point of fact not resid-

ing in San Francisco at all, but was residing in Yreka, which is distant about 360 miles from San Francisco. [101]

Name.	Occupation.
-------	-------------

Wong Leung,	Cook.
-------------	-------

(Chinese Character) (Wong Tue).

Dong Hong.

Yuen Sai Jee.

Wong Gan.

Lum Wing.

Chin Hee.

Hom Hee Tong.

Wong Yuen.

Wong Wing.

Wong Foon Yuk.

Lee Gim.

Wong Kwoon.

Kew Sing.

(Chinese Character) (Lee Jung).

Subscribed and sworn to before me this 30th day of December, 1913.

[Seal]

R. H. JONES,

Notary Public in and for the City and County of San Francisco, State of California. [102]

[Newspaper Clipping from "Chinese Republic Journal," Dated November 1, 1913.]

Chinese Republic Journal

報公國民華中

十九拿差筒話

"TELEPHONE CHINA 90

下照址住電通

CABLE ADDRESS, "TAITUNGBO"

PUBLISHED DAILY, EXCEPT SUNDAY, BY

Chung Wah Min Kock Kung Bo Co.

(FORMERLY THE CHINESE FREE PRESS, PUBLISHED BY TAI TUNG YAT BO CO.)

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NO.

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Saturday

NOVEMBER

1

1913

(Two newspaper clippings, written in the Chinese language, are here inserted in the original petition, and a translation of same is included in this transcript pursuant to a stipulation of counsel, which is also embodied herein.) [104]

Brief on Behalf of Defendant.

HO SHEE, *alias* HAW SHEE.

Departmental Warrant.

BRIEF IN BEHALF OF DETAINED.

Ho Shee is the wife of a native, Low Kawi, and arrived with him on the Siberia, October 14th, 1912. They were accompanied by a baby boy, the result of Low Kwai's prior marriage. Immediately they took a room at the Oriental Hotel where they resided for one month, until one evening when Low Kwai took the child out for fresh air, a raiding squad under the direction of Miss Donaldina Cameron of the Presbyterian Mission, or her assistant Tien Fuh Wu, forcibly took possession of Ho Shee in her room and carried her to the Mission where Ho Shee was kept against her will, and without the privilege of communicating by telephone with her husband or of seeing him when he called at the Mission.

At the first favorable opportunity, after being detained several months, Ho Shee, escaped from the Mission through the open front door, joined her husband, Low Kwai, from whom she had been forcibly separated, and went with him to Yreka, California, where they found a home in the family of Fong Wing, who kept a drug and merchandise store and employed the husband as cook. They remained in

the home of Fong Wing from March, 1913, until about the 7th of October, when they went to Sacramento, it being the intention of Low Kwai, to put his savings, with money advanced by a Chinese Association, in farming lands in the vicinity of Sacramento. These facts are testified to by eight Chinese, and three white witnesses, namely: F. W. Armstrong, Searcher of Records of Yreka, Ellsworth Tubbs and Wm. Calkirt. Calkirt rode in the same car, same train, which carried Ho Shee from Yreka to Sacramento. All testified to the good character of Hoo Shee and exemplary life led by her and her husband in Yreka.

[105]

Ho Shee and her husband arrived in Sacramento about October 8, and immediately took an apartment back of the drug and merchandise store of Yick Soo Tong, at 907 4th St. Low Kwai went into the country in search of suitable farming land to lease or purchase, every day, but returned to his wife every night. These facts are testified to by six Chinese witnesses, the detained and her husband. On or about the 20th of October, or perhaps twelve days after her arrival in Sacramento, Ho Shee was arrested at half past nine o'clock in the morning, NOT IN A HOUSE OF PROSTITUTION, NOT IN HER ROOM WHERE IT MIGHT BE ALLEGED SHE WAS RECEIVING MALE VISITORS, BUT IN THE PUBLIC STREET, IN FRONT OF THE STORE OF YICK SOO TONG, behind which store she lived.

The warrant on which this arrest was made by Inspector Robinson was issued on the request of Act-

ing Commissioner Edsell at San Francisco, dated April 2, 1913 (one month after Ho Shee had gone with her husband to Yreka) in which Mr. Edsell stated that "FROM AN ANONYMOUS SOURCE" he is informed that Ho Shee "IS NOW PRACTICING PROSTITUTION" at the Oriental or Republic Hotel and that "HER HUSBAND DESERTED HER."

Following the hearings on October 20th and 21st Ho Shee was released on bail and came to San Francisco, with her husband Low Kwai. They took Room No. 16 at the Peking Hotel, which is a respectable Chinese lodging house, advertised as such in the Chinese newspapers of San Francisco. They have continued to reside in said Room 16 ever since, and said room was furnished with the apparel and belongings of both husband and wife. Low Kwai took the first position open to him, that of porter in a saloon in the white section of San Francisco, which kept him away from home until late at night when the saloon closed.

Ho Shee was again arbitrarily taken into custody by the immigration authorities on the night of November 6th, while she was alone in her room #16, Peking Hotel, her husband being absent attending to his duties as porter of a saloon, and she was [106] detained, without hearing until ordered released by giving additional bail on November 13th. Again, since November 13th, Ho Shee has been arbitrarily arrested, and is now detained against her will *and without the privilege of bail for causes which do not appear of record.*

ARGUMENT.

THE EVIDENCE THAT HO SHEE IS A PROSTITUTE IS NOT AS CONVINCING AS THE LAW DEMANDS AND HARDLY RISES ABOVE THE LEVEL OF UNSUPPORTED SUSPICION.

This evidence of guilt is to be found in the *ex parte* statements of Miss Donaldina Cameron, who knows nothing of any facts and cannot give even good hearsay testimony at first hand, because she does not speak Chinese, and Ho Shee, who is alleged to have confessed at the Mission that she had practiced prostitution, does not speak any English; of Tien Fuh Wu, Miss Cameron's assistant at the Mission; and Policeman Weaver of Sacramento. Also there are three *ex parte* affidavits as to the reputation of the Peking Hotel. These will be discussed *seriatim*.

Was Miss Donaldina Cameron acting in good faith with the immigration authorities if she harbored for some months a Chinese girl whom she believed to be a prostitute without reporting the facts to them? Did Miss Cameron act in good faith toward the alleged slave girl needing succor and pleading to have "her child" restored to her? The evidence, uncontradicted, shows that Miss Cameron did not permit Ho Shee to leave the Mission, use the telephone, receive friends, or even her husband who called frequently or communicate with any one on the outside during those months of her detention.

Tien Fuh Wu testifies that Ho Shee asked her and Miss Cameron to rescue "her little boy," but "we were busy and couldn't attend to it" and she "got

restless and left." HO SHEE WAS DETAINED AT [107] MISSION FOR MONTHS YET THE MISSION PEOPLE WERE TOO BUSY TO RESCUE THE CHILD WHICH THEY BELIEVED BELONGED TO HO SHEE. This child, according to every statement made by Ho Shee in this record, is the son of her husband by his first wife. Tien Fuh Wu gives no testimony of her own knowledge, no facts, no circumstances of the alleged prostitution, nor dates, nor places, nor even suspicions. She merely recites which she says Ho Shee TOLD HER. IT WAS SUCH EVIDENCE AS THIS WHICH MADE JOAN OF ARC A MARTYR AND A SAINT.

The testimony of Policeman Weaver that Ho Shee practiced prostitution in Sacramento for "three months" is either due to mistaken identity or direct perjury. As proved by three white witnesses and innumerable Chinese both of Yreka and Sacramento, Ho Shee and her husband had been in Sacramento perhaps twelve days when the wife was arrested on the public street. With the exception of Weaver every one called upon says that her conduct was good in Sacramento, that she resided there with her husband, and her home and associates in that place carry good repute.

BUT WHAT OF THE WITNESS WEAVER? He was suspended from the police force for thirty days, charged with having broken up another man's home, and he would have been prosecuted further but the law of 1910 rendered the evidence of the injured husband, W. E. Osborn, against him inadmis-

sible. His affidavit that Ho Shee practiced prostitution, at 406 alley is flatly contradicted by the six roomers at that number, which is a male lodging house. No one there knows her, or ever saw her. Louis Ding, who Weaver says told him that Ho Shee practiced prostitution at the alley number, testified that he has been an enemy of Policeman Weaver, and not being on speaking terms with him could not have made any such statement attributed to him; also that Weaver has raided his—Louis Ding's—family club house perhaps fifty times, without securing a single conviction, because he, Weaver, is friendly with a Chinese faction in Sacramento which is at war with Louis Ding's faction; and that #410½ alley, [108] mentioned by Weaver, is sublet to white people.

THE SECOND ARREST OF HO SHEE, IN HER ROOM IN THE PEKING HOTEL WAS ARBITRARY, CRUEL AND UNJUSTIFIED, AND APPEARS TO HAVE BEEN MADE FOR THE PURPOSE OF PREJUDICING HER CASE BEFORE THE DEPARTMENT.

The three stock affidavits of Miss Donaldina Cameron, Carrie G. Davis, and Daniel O'Brien, of November 20th, 1913, that they believe that Peking Hotel is a house of prostitution which are offered in justification of this second arrest first made their appearance in an effort to deport, or arrest Louis Quong, who has been recognized by the Department as an American citizen, because it was alleged that he harbored prostitutes there. The learned law clerk who passed upon the sufficiency of these affi-

davits in Louis Quong's case and now prepares the memorandum in the instant case, reported:

"These affidavits are somewhat of a disappointment, as they contain nothing more than reputation or hearsay evidence, and according to what the Department now requires are of little or no value."

These affidavits were next introduced in the cases of Wong Ung Que, Chan Yuk, and Wong Ah Bow, who were never in the Peking Hotel, to prove that they were prostitutes. Now they stalk forth, like Banquo's ghost, against Ho Shee.

But these three affidavits are completely refuted, answered and demolished by the evidence of the detained, which is to the effect that Louis Quong has nothing to do with the hotel, who is managed by a respectable Chinese of the name of Mar Hing Yee, who is the lessee, having been the highest bidder when the Chinese Six Companies advertised to rent it for hotel purposes, and who has stipulated in his lease that the hotel shall not be used for any immoral purposes. Mar Hing Yee is corroborated by the testimony of Gee Sing Sam, secretary of the Six Companies, owners of the property. And Mar Hing Yee further testified as to the good conduct and reputation of Ho Shee, who with her husband Low Kwai are [109] the tenants of Room 16, and as to the circumstances of the unjustifiable raid upon Room 16 by the immigration and police officers on November 6th, when Ho Shee was arrested for the second time. The Peking and Oriental hotels are advertised in the Chinese Republic Journal as high class, respectable Chinese hotels, and they are so consid-

ered by everybody with the exception of Miss Cameron, Miss Davis and Daniel O'Brien who perhaps wisely, have refrained from giving, or attempting to give, any definite facts which they might be called upon to prove.

The credulity of this department seems to have been sadly imposed upon when a warrant of arrest for Ho Shee was issued upon an application which stated that upon information "FROM AN ANONYMOUS SOURCE" Ho Shee "IS NOW" (April 2nd after she had been in Yreka, 360 miles away for weeks) practicing prostitution at the Oriental or Republic hotel, and her "HUSBAND DESERTED HER" (although he was with her in Yreka) is still near her and never has deserted her.

If such drastic proceedings as this one, looking to the deportation of Ho Shee, whereby a citizen of the United States may be deprived of the right of coverture, the right to enjoy a home and wife who shall administer to his motherless babe; whereby even a hated alien may be deprived of her freedom and of her rights of property, is justifiable under the laws of the United States and the regulations of an executive department, when such proceeding is admittedly initiated upon an "anonymous" communication, "Democracy" is but a hollow mockery. It may be but a short wait for Lettres-de-Cachet and the Empire.

We respectfully submit that on the record which has been offered for our inspection there is nothing worthy of the name of evidence to sustain the charge of prostitution against Ho Shee and that the war-

rant of arrest should be canceled.

Respectfully, [110]

STADDEN & STEWART,

Counsel for Ho Shee.

Washington, D. C., January 15, 1914.

[Endorsed]: Filed Feb. 2, 1914. W. B. Maling,
Clerk. By Lyle S. Morris, Deputy Clerk. [111]

*In the District Court of the United States, in and
for the Northern District of California, Division
No. 1.*

In the Matter of the Application of LOW KWAI,
upon Behalf of MRS. LOW KWAI, Some-
times Known as Ho Shee, or HO (HAW)
SHEE, On Habeas Corpus.

Order to Show Cause.

Good cause appearing therefor and upon reading the verified petition on file herein, it is hereby ordered that Samuel W. Backus, Commissioner of Immigration for the Port and District of San Francisco, appear before this Court on the 7 day of February, 1914, at the hour of 10 o'clock A. M. of said day, to show cause, if any he has, why a writ of habeas corpus should not be issued herein as prayed for; and that a copy of this order be served upon the said Commissioner, and a copy of said petition upon the United States Attorney.

AND IT IS FURTHER ORDERED that the said Samuel W. Backus, Commissioner of Immigration as aforesaid, or whoever, acting under the orders of said Commissioner, shall have the custody of the said

Mrs. Low Kwai, sometimes known as Ho Shee or Ho (Haw) Shee, are hereby ordered and directed to retain the said Mrs. Low Kwai, sometimes known as Ho Shee or Ho (Haw) Shee, within the custody of the said Commissioner of Immigration and within the jurisdiction of this Court until its further order herein.

Dated, San Francisco, California, February 2, A. D. 1914.

M. T. DOOLING,
United States District Judge.

[Endorsed]: Filed Feb. 2, 1914. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [112]

*In the District Court of the United States, in and for
the Northern District of California, First Di-
vision.*

No. 15,591.

In the Matter of MRS. LOW KWAI, Sometimes
Known as HO SHEE or HO (HAW) SHEE,
on Habeas Corpus.

Demurrer to Petition for Writ of Habeas Corpus.

Now comes the respondent, Samuel W. Backus, Commissioner of Immigration at the port of San Francisco, and demurs to the petition on file herein on the following grounds:

I.

That said petition does not state facts sufficient to entitle petitioner to the issuance of a writ of habeas corpus or any relief thereon.

II.

That said petition is insufficient in that the statements in the petition relative to the record of the testimony taken on the hearing for the order of deportation of the applicant, are statements of conclusions of law.

WHEREFORE, respondent prays that the writ of habeas corpus be denied.

JOHN W. PRESTON,

United States Attorney,

WALTER E. HETTMAN,

Assistant U. S. Attorney,

Attorneys for Respondent. [113]

Service of the within demurrer to Petition for Writ by copy admitted this 6th day of Feby., 1914.

GEO. A. MCGOWAN,

Attorney for Petitioner.

[Endorsed]: Filed Feb. 6, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [114]

At a stated term of the District Court of the United States of America, for the Northern District of California, held at the Courtroom thereof, in the City and County of San Francisco, State of California, on Wednesday, the 25th day of February, in the year of our Lord one thousand nine hundred and fourteen. Present: The Hon. F. S. DIETRICH, Judge.

#15,591.

In re HO SHEE, on H. C.

(Order Overruling Demurrer.)

This matter this day came on for hearing on the

demurrer to the petition herein, and after hearing respectively counsel, by the Court ordered that said demurrer be, and the same is hereby overruled.
[115]

*In the District Court of the United States, in and for
the Northern District of California, First Di-
vision.*

No. 15,591.

In the Matter of the Application of LOW KWAI,
on Behalf of MRS. LOW KWAI, Sometimes
Known as HO SHEE, or HO (HAW) SHEE,
on Habeas Corpus.

Return.

Now comes Samuel W. Backus, Commissioner of Immigration at the port of San Francisco, by Charles D. Mayer, Immigrant Inspector, and in return to the Order to Show Cause issued by said Court on the petition of Low Kwai, for a writ of habeas corpus, respectfully shows that your respondent holds the alien above named, to wit, HO SHEE or HAW SHEE, under and by virtue of a warrant of deportation dated January 27th, 1914.

I.

Respondent admits the allegations in lines 15 to 32 inclusive of page 1 of said petition, but denies that said imprisonment, detention, confinement and restraint are illegal.

II.

Respondent admits the allegations in lines 1 to 32 inclusive of page 2 of said petition. [116]

III.

Respondent denies the allegations in lines 8 to 25 inclusive of page 3 of said petition, and alleges that the warrant of arrest and all proceedings had thereon, are not illegal, null and void because the husband of the said Ho Shee is a citizen of the United States, and that said proceedings are not in violation of any of the acts of Congress or any violation of any constitutional rights of the said petitioner.

IV.

Respondent denies the allegations in lines 26 to 33 inclusive, page 3 of said petition, and alleges that said immigration proceedings are not in violation of the guarantees to said petitioner as a citizen of the United States contained in section 2, Article III, of the Constitution of the United States.

V.

Respondent denies the allegations in lines 2 to 11, inclusive, page 4 of said petition.

VI.

Respondent denies the allegations in lines 12 to 16, inclusive, page 4 of said petition.

VII.

Respondent denies the allegations in lines 23 to 30, inclusive, page 4 of said petition, and alleges that the said alien was not denied a fair opportunity to present her defense to the charges brought against her, and denies that there were any proceedings in said warrant of deportation which were unfair in any of the following particulars:

FIRST: Respondent denies the allegations in lines 31 to 32 inclusive, page 4, and lines 1 to 12,

[117] inclusive, page 5 of said petition, and alleges that certain testimony was taken before said immigration officials and that subsequently upon the arraignment of said Ho Shee, she was acquainted with the charges against her and given every opportunity to rebut said testimony, and that all of said proceedings were fully in accord with rule 22, 4B Immigration Laws.

SECOND.—Respondent admits the allegations in lines 13 to 24 inclusive, page 5 of said petition, to the effect that the alien was retained in custody for some time before the formal arraignment under the warrant of arrest, but that at the stage of the proceedings deemed proper by the immigration officials, and in compliance with rule 22, 4B Immigration laws, the alien was duly arraigned and acquainted with her rights in the matter and given an opportunity to rebut any testimony presented by the immigration officials.

THIRD. Respondent admits the allegations in lines 25 to 32, inclusive, page 5 of said petition, that the alien was taken into custody on the 6th day of November, 1913, and retained in custody until November 11, 1913, by the Immigration officials, but that she was subsequently released. Respondent denies that said detention injured or deprived said Ho Shee of any of the rights and privileges granted her under the immigration rules and regulations.

Respondent denies the allegations in lines 1 to 10, inclusive, page 6 of the said petition, and alleges that no hearing of said witnesses Daniel J. O'Brien, Miss Carrie G. Davis and Miss Donaldina Cameron was

had upon the 9th day of November, 1913, but that upon the 20th day [118] of November, 1913, said parties made individual affidavits as to the character of the house designated as the Peking Hotel.

FOURTH: Respondent denies the allegations in lines 11 to 32, inclusive, page 6 of said petition, and alleges that the evidence given by James Weaver and other witnesses at Sacramento, California, on October 17th, 1913, was in the nature of affidavits.

FIFTH: Respondent admits the allegations in lines 2 to 11, inclusive, page 7 of said petition, but denies that said telegram to the Secretary of Labor prejudiced the rights of the said detained in any way.

SIXTH: Respondent denies the allegations in lines 12 to 32, inclusive, page 7 of said petition and lines 1 to 3, inclusive, page 8 of said petition, and alleges that there was no hearing on the 9th day of November, 1913, but that the affidavits dated November 20th, 1913, sworn to by Daniel J. O'Brien, Miss Carrie G. Davis and Miss Donaldina Cameron, were filed in the record of the said Ho Shee.

SEVENTH: Respondent denies the allegations in lines 4 to 27, inclusive, page 8 of said petition.

EIGHTH: Respondent denies the allegations in lines 1 to 14, inclusive, page 9 of said petition, and alleges that the alien and her attorney were given an opportunity to inspect all of the evidence which was submitted to the Secretary of Labor for his ruling.

TENTH: Respondent admits the allegations in lines 15 to 26, inclusive, page 9 of said petition, and alleges that the letter of transmission which accompanied the record to the Secretary of Labor was in

the nature of [119] a private and secret communication and for that reason no copy was furnished to the said petitioner or to the said attorney representing Ho Shee.

VIII.

Respondent denies the allegations in lines 1 to 10, inclusive, page 10 of said petition.

WHEREFORE, your respondent prays that a writ of Habeas Corpus do not issue herein, that the Order to Show Cause be discharged, and that the Petition be dismissed.

JOHN W. PRESTON,
United States Attorney, Attorney for Respondent.

By WALTER E. HETTMAN,
Assistant United States Attorney. [120]

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

Charles D. Mayer, being first duly sworn, deposes and says: That he is an Immigrant Inspector connected with the Immigration Service for the port of San Francisco, and has been specially directed to appear for, and represent the respondent, Samuel W. Backus, Commissioner of Immigration, in the within entitled matter; that he is familiar with all the facts set forth in the within Return to Order to Show Cause, and knows the contents thereof; that it is impossible for the said Samuel W. Backus to appear in person or to give his attention to said matter; that of affiant's own knowledge, the matters set forth in the Return to Order to Show Cause are true, excepting those matters which are stated on informa-

tion and belief, and that as to those matters, he believes it to be true.

CHARLES D. MAYER.

Subscribed and sworn to before me this 20th day of March, 1914.

[Seal]

FRANCIS KRULL,

Deputy Clerk U. S. District Court, Northern District of California.

[Endorsed]: Filed Mar. 20, 1914. W. B. Maling, Clerk. By Francis Krull, Deputy Clerk. [121]

In the District Court of the United States, in and for the Northern District of California, First Division.

No. 15,591.

In the Matter of LOW KWAI, upon Behalf of Mrs. LOW KWAI, Sometimes Known as HO SHEE, or HO (HAW) SHEE, on Habeas Corpus.

Traverse to Return.

Comes now the petitioner herein, Low Kwai, upon behalf of Mrs. Low Kwai, sometimes known as Ho Shee, or Ho (Haw) Shee, and traversing the Return of Respondent filed herein, does hereby deny, allege and admit as follows, to wit:

I.

Your petitioner reaffirms and realleges each, every, all and singular the averments and allegations contained in the petition for a writ of habeas corpus filed herein, excepting in line 4, page 6, and line 12,

page 7, November 9th should be 20th, and denies each, every, all and singular the allegations contained in the said Return which are in contravention of or at variance with the said petition.

Dated San Francisco, California, March —, 1914.

GEO. A. McGOWAN,
Attorney for Petitioner.

It is hereby stipulated and agreed by and between the counsel for the respective parties hereto that verification of the foregoing Traverse is hereby waived, as is also exception to the general reaverments and denial contained in said traverse.

GEO. A. McGOWAN,
Attorney for Petitioner.

WALTER E. HETTMAN,
Attorney for Respondent. [122]

Due service of the within Traverse to Return, by my receipt of a copy thereof, is hereby acknowledged by me this 30th day of March, 1914.

WALTER E. HETTMAN,
Attorney for Respondent.

[Endorsed]: Filed Mar. 30, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [123]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

No. 15,591.

In the Matter of the Application of LOW KWAI,
upon Behalf of Mrs. LOW KWAI, Some-
times Known as HO SHEE, or HO (HAW)
SHEE, on Habeas Corpus.

**(Order Discharging Writ of Habeas Corpus, Re-
manding Ho Shee and Staying Deportation for
the Period of 20 Days.)**

GEORGE A. MCGOWAN, Attorney for Peti-
tioner.

JOHN W. PRESTON, U. S. Atty., and WAL-
TER E. HETTMAN, Asst. U. S. Atty., At-
torneys for Respondent.

The record herein having been carefully consid-
ered, I am of the opinion that within the law as laid
down in the adjudicated cases, the order of the Secre-
tary of Labor directing the deportation of Ho Shee
cannot be disturbed by the Court. By this, however,
the Court does not desire to be understood as approv-
ing the issuance of a warrant of arrest upon "anony-
mous information." If we were dealing here only
with the warrant of arrest I would have no hesitancy
in ordering the woman's discharge. But the case has
progressed far beyond the original warrant of arrest,
and in the subsequent proceedings the officers seem
to have kept within the somewhat elastic bounds, by
which their actions are, under the law and the adju-

dications, [124] freed from strict control.

It is, therefore, ordered that the writ of habeas corpus be discharged, and Ho Shee remanded.

It is further ordered that she be not deported for twenty days, within which time she may, if she so desires, appeal from this order, upon which appeal, if taken, her deportation will be stayed until such appeal be determined.

April 16th, 1914.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Apr. 16, 1914. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [125]

*In the District Court of the United States, in and for
the Northern District of California, Division
No. 1.*

No. 15,591.

In the Matter of the Application of LOW KWAI,
upon Behalf of Mrs. LOW KWAI, Some-
times Known as HO SHEE, or HO (HAW)
SHEE, on Habeas Corpus.

Petition for Appeal.

Now come Low Kwai and Mrs. Low Kwai, some-
times known as Ho Shee, or Ho (Haw) Shee, re-
spectively the petitioner and the detained, and the
appellants herein, and say:

That, on the 16th day of April, 1914, the above-
entitled Court made and entered its order denying
the petition for a writ of habeas, as prayed for, on
file herein, in which said order in the above-entitled

cause certain errors were made to the prejudice of the appellants herein, all of which will more fully appear from the assignment of errors filed herewith.

WHEREFORE, those appellants pray that an appeal may be granted in their behalf to the Circuit Court of Appeals of the United States, for the Ninth Circuit thereof, for the correction of the errors so complained of, and further, that a transcript of the record, proceedings and papers in the above-entitled cause, as shown by the praecipe, duly authenticated, may be sent and transmitted to the said United States Circuit Court of Appeals, for the Ninth Circuit thereof.

Dated at San Francisco, California, May 19th, A. D. 1914.

GEO. A. McGOWAN,

Attorney for Petitioner and Detained, and Appellants Herein. [126]

Due service of the within Petition for and Order Allowing Appeal and receipt of a copy thereof is hereby admitted this 19th day of May, A. D. 1914.

JOHN W. PRESTON,

U. S. Atty.

[Endorsed]: May 20, 1914. W. B. Maling, Clerk.
By C. W. Calbreath, Deputy Clerk. [127]

*In the District Court of the United States, in and for
the Northern District of California, Division
No. 1.*

No. 15,591.

In the Matter of the Application of LOW KWAI,
upon Behalf of Mrs. LOW KWAI, Some-
times Known as HO SHEE, or HO (HAW)
SHEE, on Habeas Corpus.

Assignment of Errors.

(On Appeal from District Court.)

Comes now, Low Kwai, and Mrs. Low Kwai, some-
times known as Ho Shee, or Ho (Haw) Shee, the
appellants herein, by their attorney, George A. Mc-
Gowan, Esquire, in connection with their petition,
for an appeal herein, assign the following errors,
which they aver occurred upon the trial or hearing
of the above-entitled cause, and upon which they will
rely, upon appeal to the Circuit Court of Appeals,
for the Ninth Circuit, to wit:

FIRST: That the Court erred in denying the peti-
tion for a writ of habeas corpus herein.

SECOND: The Court erred, in holding that it had
no jurisdiction to issue a writ of habeas corpus, as
prayed for in the petition herein.

THIRD: That the Court erred, in not holding that
the allegation contained in the petition herein, for
a writ of habeas corpus, were sufficient in law, to
justify the granting and issuing of a writ of habeas
corpus, as prayed for, in said petition.

FOURTH: That the Court erred in not holding that the Secretary of Commerce and Labor or the Secretary of Labor, could not issue a warrant of arrest without reasonable cause and not supported by oath of affirmation. [128]

FIFTH: That the Court erred, in not holding that a native born citizen of the United States is entitled of right to a hearing before the judicial branch of the Government before his wife may be deported out of the United States, and he thus deprived of her society, protection, care and comfort.

SIXTH: That the Court erred, in holding that it was not an abuse of discretion by the immigration authorities, and did not deprive the alien of a fair hearing to examine James Weaver on the 17th day of October, 1913, and Tien Fuh Su, and Donaldina Cameron, upon the 20th day of October, 1913, and refuse the alien the right to be present with her attorney at said examination. The warrant of arrest having been issued on the 11th day of April, 1913, and the alien was arrested on October 17th, 1913, and thereafter refuse to set a time and place at which the said three witnesses might be present and examined, in the presence of the alien, by her counsel and upon behalf of the alien and her citizen husband.

SEVENTH: The Court erred in not holding that it was an abuse of discretion for the immigration officials to take the alien into custody on the sixth (6th) day of November, 1913, and retain her in their custody until the 11th day of November, 1913, she having previously been at large on a satisfactory bond for her future appearance and being thereafter re-

leased upon the same bond, and depriving and preventing her from the right of counsel during said time; and in telegraphing to the Secretary of Labor, on November 7th, 1913, the information that the detained and violated the immigration law, pending the adjudication of her case, and refusing to place any evidence, as a basis therefor, in the record which the alien or her citizen husband might answer. [129]

EIGHTH: That the Court erred, in not holding that it was an abuse of discretion, and did not deprive the alien of a fair hearing, for the immigration authorities to refuse to set a time and place for a second hearing in Sacramento, where the alien was arrested, and where a hearing was held, at which detrimental testimony was taken, prior to according her the right of counsel, and thus arbitrarily preventing her from having the witness, James Weaver, a resident of Sacramento, present, so that he might be cross-examined or examined upon her behalf, and in denying the alien any opportunity at all to submit evidence upon her behalf, from the said witness, at a hearing in the city of his residence and where the alien was arrested.

NINTH: The Court erred, in holding that it was not an abuse of discretion and did not deprive the alien of a fair hearing for the Government to take the testimony of Daniel J. O'Brien, Miss Cary G. Davis, and Miss Donaldina Cameron, on the 20th day of November, 1913, in the form of *ex parte* affidavits after the right of counsel had been allowed the said alien, thus preventing her from an opportunity to examine said witnesses upon her own behalf and thus submit their testimony, and in refusing to thereafter

set a time and place at which said witnesses might be called and cross-examined upon behalf of said alien, or for examination upon her behalf if cross-examination should not be allowed.

TENTH: The Court erred, in holding that it was not an abuse of discretion, and did not deprive the alien of a fair hearing for the immigration officials to compel the alien to submit her defense in the form of *ex parte* affidavits, and thereafter refuse to examine and take the testimony of the witnesses offered upon behalf of the alien and her citizen husband, and then arbitrarily disregard the contents of the affidavits presented from said witnesses as the basis for their future examination. [130]

ELEVENTH: The Court erred, in holding that it was not an abuse of discretion, and did not deprive the alien of a fair hearing for the immigration authorities to submit their evidence against the alien, in the form of oral examinations from the witnesses prior to according the alien the right of an attorney and to thereafter present the evidence from the Government witnesses in the form of *ex parte* affidavits, thus preventing and depriving the alien of any opportunity of being confronted with any witnesses being presented against her and depriving her of any and all opportunity to submit evidence of said government witnesses upon her own behalf.

TWELFTH: The Court erred, in holding that it was not an abuse of discretion, and did not deprive the alien of a fair hearing, for the Commissioner of Immigration, after the close of the Government case against the said alien, to submit evidence to the de-

partment detrimental to the said alien, which said detrimental evidence had been previously withheld from the said alien, and no opportunity at all afforded her at any time of meeting or answering said evidence which was clandestinely forwarded to the Secretary of Labor, and in so abridging and limiting the right of the counsel of the alien as to prevent counsel from ascertaining all the evidence submitted against the said alien.

WHEREFORE, the appellants pray that the judgment and order of the United States District Court, in and for the Northern District of the State of California, made and entered herein in the office of the Clerk of the said Court on the 16th day of April, A. D. 1914, discharging the order to show cause and dismissing the petition for a writ of habeas corpus be reversed and that this cause be remitted to the said lower court with instructions to discharge the said Mrs. Low Kwai, sometimes known as Ho Shee or Ho (Haw) Shee, from [131] custody, or grant her a new trial before the lower court, by directing the issuance of writ of habeas corpus, as prayed for in said petition.

Dated San Francisco, California, May 20th, 1914.

GEO. A. MCGOWAN,

Attorney for Appellants.

Due service of the within Assignment of Errors and receipt of a copy thereof is hereby admitted, at San Francisco, California, this 20th day of May, A. D. 1914.

JOHN W. PRESTON,

United States Attorney.

[Endorsed]: Filed May 20, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [132]

*In the District Court of the United States in and for
the Northern District of California, Division
No. 1.*

No. 15,591.

In the Matter of the Application of LOW KWAI
upon Behalf of Mrs. LOW KWAI, Some-
times Known as HO SHEE, or HO (HAW)
SHEE, on Habeas Corpus.

Order Allowing Petition for Appeal.

On this 3d day of August, A. D. 1914, came Low Kwai, and Mrs. Low Kwai, sometimes known as Ho Shee, or Ho (Haw) Shee, respectively, the petitioner and the detained, herein, by their attorney, George A. McGowan, Esq., and having previously filed herein, did present to this Court, their petition praying for the allowance of an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, intended to be urged and prosecuted by them, and praying also that a transcript of the record and proceedings and papers upon which the judgment herein, was rendered, duly authenticated, may be sent and transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had in the premises as may seem proper.

ON CONSIDERATION WHEREOF, the Court hereby allows the appeal hereby prayed for, and orders execution and remand stayed pending the

hearing of the said case in the said United States Circuit Court of Appeals for the Ninth Circuit; and it is further ordered, after hearing counsel for the petitioner and for the Government, that the said detained may remain at large upon the bond previously given before this court, in this matter, during the pendency of the appeal taken herein from said judgment, provided said appeal be docketed in the Circuit Court of Appeals in the October Term, and that she do not depart from the jurisdiction of this Court, but remain and abide by whatever judgment shall finally be entered herein.

Dated at San Francisco, California, this 3d day of August, 1914.

M. T. DOOLING,

United States District Judge. [133]

Service of the within Order Allowing Appeal, and receipt of a copy thereof, is hereby admitted this 4th day of August, A. D. 1914.

WALTER E. HETTMAN,

Asst. United States District Attorney.

[Endorsed]: Filed Aug. 4, 1914. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [134]

In the District Court of the United States, in and for the Northern District of California, Division No. 1.

No. 15,591.

In the Matter of the Application of LOW KWAI upon Behalf of Mrs. LOW KWAI, Sometimes Known as HO SHEE, or HO (HAW) SHEE, on Habeas Corpus.

Notice of Appeal.

To the Clerk of Above-entitled Court and to the
Hon. JOHN W. PRESTON, United States At-
torney for the Northern District of California:

You and each of you will please take notice that
Low Kwai and Mrs. Low Kwai, sometimes known
as Ho Shee, or Ho (Haw) Shee, respectively, the
petitioner and the detained, above named, do hereby
appeal to the Circuit Court of Appeals of the United
States, for the Ninth Circuit thereof, from the order
made and entered herein on the 16th day of April,
1914, denying the petition for a writ of habeas cor-
pus filed herein.

Dated at San Francisco, California, May 19th,
1914.

GEO. A. McGOWAN,

Attorney for Petitioner and Detained, and Appel-
lants.

Due service of the within Notice of Appeal and
receipt of a copy thereof is hereby admitted this
19th day of May, A. D. 1914.

JOHN W. PRESTON,

U. S. Attorney.

[Endorsed]: Filed May 20, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [135]

(Citation on Appeal—Copy.)

UNITED STATES OF AMERICA,—ss.

The President of the United States, to Hon. SAMUEL W. BACKUS, Commissioner of Immigration, Port of San Francisco, and to his Attorney, JOHN H. PRESTON, United States Attorney in and for the Northern District of California, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California Division No. 1, thereof wherein Low Kwai and Mrs. Low Kwai, sometimes known as Ho Shee or Ho (Haw) Shee are appellants, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable MAURICE T. DOOLING, United States District Judge for the Northern Dist. of California this 10 day of August, A. D. 1914.

M. T. DOOLING,
United States District Judge. [136]

Service of the within Citation on Appeal and receipt of a copy thereof is hereby admitted this 10th day of Aug., 1914.

WALTER E. HETTMAN,
Asst. U. S. Atty.

[Endorsed]: Filed Aug. 10, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [137]

(Notation on Margin of "Warrant—Arrest of
Alien.")

Executed at Sacramento, Calif. Oct. 17, 1913.

JOHN A. ROBINSON,
Inspector. [138]

Request for Verification of Landing.

DEPARTMENT OF COMMERCE AND LABOR.
IMMIGRATION SERVICE.

No. 12020/190.

Office of Commissioner of Immigration.

Port of San Francisco, Cal.,

April 2, 1913, 191.

Commissioner of Immigration,

San Francisco, Cal.

Sir:

You are requested to verify the landing of the
alien

*Name (*as given on landing*) Ho Shee or Haw Shee
(Ho Shi)

Arrived per S. S. Siberia; P. M. Line;

Age, 22; Sex, Female; Married, Yes.

Citizen of China; Race, Chinese; Occupation, Housewife.

Port of embarkation: ———

Port of landing in U. S.: San Francisco.

Date of arrival, October 14, 1912. (Time Stamp)

Final destination: San Francisco.

To whom going: ———

Purpose for which verification is desired: Deportation proceedings contemplated.

Remarks:

Respectfully,

(Name) H. EDSELL,

(Title) Act'g Commissioner.

Fha/Mah.

*Alien's signature, where practicable, to be written in native language and attached. [139]

Certificate of Admission of Alien.

**DEPARTMENT OF COMMERCE AND LABOR.
IMMIGRATION SERVICE.**

12020-190. Angel Island, Cal., April 3, 1913.

I Hereby Certify that the following is a correct record and statement of facts relative to the admission to the United States of the alien named below:

- (1) S. S. Siberia; Line, Pacific Mail.
- (2) Date arrival, October 14, 1912; Manifest No. 14589. Class.
- (3) Port at which admitted, San Francisco.
- (4) Name, Ho Shee; age, 22; sex, female.
- (5) Married, yes; occupation, housewife; able to read and write.

152 *Low Kwai and Mrs. Low Kwai*

- (6) Native of China; race, Mongolian.
- (7) Last permanent residence, China.
- (8) Destination, San Francisco.
- (9) By whom passage paid, ———; money brought, \$——.
- (10) Whether in U. S. before, ———; when, ———; where, ———.
- (11) To whom going, ———; condition of health, ———.
- (12) Height, ———; complexion, ———; color of hair, ———.
- (13) Color of eyes, ———; identification marks, ———.
- (14) Place of birth, ———; examined by Inspector, ———.
- (15) How admitted, ———; accompanied by ———.
- (16) Remarks: ———.

Exact copy as signed by Samuel W. Backus.

(Signature) Apr. 3, 1913, by L. E. D.,

(Official title) Commissioner.

ESK.

LOR.

LED. [140]

**(Statements of Witnesses Taken at Police Station,
Sacramento.)**

Sacramento, California, Friday, October 17, 1913.

In re Department Warrant 53423, Slant 225, in Case
of YEE MO.

STATEMENTS OF WITNESSES TAKEN AT
POLICE STATION, SACRAMENTO, CALI-
FORNIA, BY JOHN A. ROBINSON, IN-
SPECTOR U. S. IMMIGRATION DEPART-
MENT, THERE BEING ALSO PRESENT
MR. J. H. McCLYMONT, CHINESE INTER-
PRETER.

STATEMENT OF WITNESSES:

James Weaver,	2
E. R. Malone,	5
Anna Phelps,	6
Rose Ying,	9

JOSEPH E. PIPHER,
Courthouse, Sacramento, California,
Official Shorthand Reporter. [141]

**[Statement of James Weaver, Taken at Police
Station, Sacramento, Cal., October 17, 1913.]**

Police Station, City of Sacramento,
Sacramento, California, Friday, October 17, 1913.

STATEMENT OF

JAMES WEAVER, Police Officer of the City of
Sacramento, who, after being first duly sworn by
John A. Robinson, Inspector, testifies as follows, to
wit:

Mr. ROBINSON.—Q. What is your name?

A. James Weaver.

Q. And how old are you, Mr. Weaver?

A. Twenty-three.

Q. What is your occupation?

A. Occupation, police officer.

Q. Of Sacramento? A. Of Sacramento.

Q. Now, how long have you held such position; how long have you been a police officer here?

A. I have been a police officer over seven months.

Q. Is your beat in what is commonly known as the tenderloin district? A. Yes, sir.

Q. Chinese tenderloin district.

A. It is; it comprises all of Chinatown.

Q. Are you familiar with the Chinese houses of prostitution in Chinatown, Sacramento? A. I am.

Q. Do you recognize this woman here (referring to one Ho Shee)?

A. I positively identify her as being one of the inmates of a Chinese house of prostitution at 410½ in the alley.

Q. 410½ China alley?

A. No; 410½ alley I and J, Fourth and Fifth, Sacramento.

Q. Now, you do not know what her name is?

A. I don't know what her name is; I have not heard it. [142]

Mr. ROBINSON.—Referring to a Chinese woman Ho Shee, for whom Department warrant 53575, Slant 255 was issued the eleventh day of April, 1913.

Q. How long have you known this woman,—referring to Ho Shee,—to be a prostitute in Chinatown, Sacramento? How long have you seen her there.

A. Just a moment, now, until I get it exactly.

Q. Approximately, is all. A. Approximately.

Q. Yes.

A. Approximately, over three months, all of which time she has been a continual inmate of a house of prostitution.

Q. And then you say you saw her in bed with Chinamen?

A. I have seen her partly disrobed with Chinamen; I have seen her in bed with Chinamen at one time,—different Chinamen each time.

Q. And you positively know that the place that you saw this woman, referring to Ho Shee, was a Chinese house of prostitution?

A. I do, for the man that ran it said it was a house of prostitution, and described her to me as being one of the girls that were prostitutes, at the same time saying that one of them was not a prostitute, but was sick.

Q. What is the name of the man whom you knew to be the keeper of this house of prostitution 410 $\frac{1}{2}$?

A. The man's name was Louie Ding.

Q. Do you know the other Chinese woman, too,—that old fat one? A. I do.

Q. She is the keeper there?

A. I do not know whether or not she is the keeper but she is an inmate of that place.

Q. Do you recognize the stout, fat woman who was arrested this morning, as an inmate of the same house that this woman, referring to Ho Shee, who was arrested, was?

A. I arrested Ho Shee, and recognize her as being

in the same house. [143]

Q. No; that is the old woman.

A. The old woman.

Q. Yee Moo.

A. Yee Moo,—I recognize her as being an inmate of the same house; I placed her in custody this morning.

Q. Do you know how long she has been an inmate of that house?

A. Ever since I have been in that district.

Q. For the past seven months?

A. No; I have only been down there about three months.

Q. Three months?

A. Down there. Yee Moo has been a constant inmate of that house.

Q. Is it downstairs or upstairs at 410½?

A. These women are upstairs; 410½ alley I and J, Fourth and Fifth.

Mr. ROBINSON.—I will now have the officers bring Yee Moo in and have you identify her, so there will be no misunderstanding as to her identity. This Chinese woman is a woman we know as Yee Moo. (Yee Moo brought into the room.)

(The Interpreter, Mr. McClymont, at this point translated what was going on to the detainant Ho Shee.)

Mr. ROBINSON.—Mr. Weaver, I ask you now to look at this woman who is known to us as Yee Moo. Do you know what this woman's name is?

A. I do not.

Q. Have you seen her anywhere? A. I have.

Q. Where have you seen her?

A. In a house of prostitution.

Q. At what address?

A. At 410½ Alley, I and J, Fourth and Fifth.

Q. At the same place as this woman Ho Shee was located? A. In the same house as Ho Shee.

Q. There is no doubt in your mind as to her identity? A. No, sir.

Q. You do not know her by the name of Yee Moo?

A. I don't know either of their names. [144]

Q. How long have you known her in that place,—this woman referring to the woman Yee Moo.

A. The woman Yee Moo, I have known her,—that short, fat woman, I have known her for the period of three months.

Q. Ever since you have been located on that beat?

A. Ever since the first day I was upon the beat, I saw them down there.

Q. And there is no mistake as to your identification of either the woman Yee Moo or Ho Shee?

A. No mistake as to their occupation, no.

JAMES WEAVER,

Address: Police Department, Sacramento, California.

[Statement of E. R. Malone, Taken at Police Station, Sacramento, Cal., October 17, 1913.]

STATEMENT OF

E. R. MALONE, Police Officer of the City of Sacramento, who, after being duly sworn by J. A. Robinson, Inspector, testifies as follows:

Mr. ROBINSON.—Q. Your name is E. R. Ma-

lone? A. Yes, sir.

Q. How old are you, Mr. Malone?

A. Fifty years of age.

Q. What is your occupation? A. Police officer.

Q. Of Sacramento? A. Of Sacramento, yes, sir.

Q. How long have you been a police officer of Sacramento? A. Eleven years.

Q. During the time you have been a police officer, have you ever been detailed in the Chinese District, Sacramento? A. Yes, sir.

Q. Are you familiar with the Chinese houses of prostitution?

A. Yes, sir; up until the first of last April, I was.

Q. Have you ever seen this woman here, pointing to the woman that we know as Yee Moo?

A. Yes, sir.

Q. Where?

A. Well, I saw her in the alley Third and Fourth, I and J, on the north side of the alley, in a house there known as a house of prostitution. [145]

Q. Do you know the number of it?

A. I don't know the number of that house.

Q. How long ago?

A. Oh, I have seen her there two or three times during this last three or four years. I was with the Government man on one occasion, and she was in there. I was in there myself a couple of times, and saw her there.

Q. Is that the house,—the second house on the right hand side of the China Alley going from Fourth Street? A. Going west, yes, sir.

Q. Upstairs? A. Yes, sir.

Q. Were you present about a year ago, when a Chinese girl was arrested by Inspector Swazy and myself at this house that you have mentioned?

A. Yes, sir; I believe you arrested two of them, didn't you?

Q. Got two girls? A. Yes, sir.

Q. Do you remember this woman known as Yee Moo being present? A. Yes, sir; she was there.

Q. How long had you known her to be an inmate of that house at that time?

A. Well, I used to visit the house once in a while; I never was called there, but just sometimes I would take a notion to go in and see who was there, and I would see her there once in a while, you know, at that house. She claimed to be working there, you know, but she was always there.

Q. You knew that to be a Chinese house of prostitution? A. Yes, sir.

Q. Now, have you ever seen her in a house in Chinatown since that time?

A. Oh, I have seen her in stores, going in and buying stuff, or something like that, but never saw her living any place else,—not to my recollection.

E. R. MALONE,

Address: Police Department, Sacramento, California. [146]

**[Statement of Anna Phelps, Taken at Police Station
Sacramento, Cal., October 17, 1913.]**

STATEMENT OF

ANNA PHELPS, Matron Police Station, who, after being first duly sworn by the Inspector, testifies as follows, to wit:

Mr. ROBINSON.—Q. What is your nome?

A. Phelps. Anna Phelps.

Q. What is your occupation?

A. I am matron at the Receiving Hospital and the City Jail.

Q. At Sacramento, California? A. Yes, sir.

Q. How long have you held such position?

A. I guess about nine years.

Q. Do you recognize this Chinese woman, referring to the woman Yee Moo,—do you recognize this woman here, Yee Moo?

A. Yes, sir,—well, I don't know her name, you know; I had no occasion to find out. I know her, but I don't know her name.

Q. Can you state the circumstances under which you first met her?

A. Why, we had an occasion to go there to get a girl, a Chinese girl that she had in her house, and she did not want to let us in; in fact, she did not let us in; we just had to shove our way in there, and we found this girl in a room away back, and she had her locked in. We made her open the door, and the girl said,—the girl was scared to death; she did not want to talk at all. She was an awful pretty girl, and she told me that this woman kept her in this room and kept her locked up, and took all her money,—and a Chinaman, some man,— and it was this Louie Ding, or some such a name. I know him when I see him.

Q. This house you speak of,—

A. (Interrupting.) Was on the corner of the alley I and J, on Fourth Street. ¶

Q. On the right or left hand side?

A. Let me see; It was on the right-hand side, going towards K. [147]

Q. The first house, was it?

A. Well, in the alley,—when you went in the alley.

Q. The first doorway or second doorway?

A. First doorway.

Q. Is that a known house of prostitution, do you know?

A. Well, they say it is,—I guess it is.

Q. That is the general repute?

A. Yes, sir; that is the general repute, yes, sir, it is.

Q. Now, do you remember what the name of that girl was that you took out at that time?

A. No, I do not.

Q. What was done with her?

A. Why, I think Miss Cameron took her.

Q. Of the Presbyterian Mission in San Francisco?

A. Yes, sir.

Q. Who was with you at that time?

A. Well, there was Officer Biggs,—he is not on the force now,—and I am pretty sure it was Mr. Kramer. I know Biggs was one of them; I am very sure it was Kramer.

Q. Now, let's see: You said about a year ago, didn't you say? About how long ago was this?

A. Oh, I guess,—we have taken three girls out of this,—two girls out of this house for Miss Cameron.

Q. That same house? A. That same house.

Q. During what period?

A. Well, it is in the last two years.

Q. How long ago was the first one that you speak of, where she held the girl?

A. Well, now I just couldn't tell you, but it is two years and over.

Q. Where she held the girl and took her money?

A. Yes, sir; it is two years and over.

Q. Now, you know her to be the keeper of a Chinese house of prostitution?

A. I know that she was in that house; I saw her [148] keeping that house when I went there after that girl. Now, whether she owned the house or not, I don't know, but I know she was there, and did not want us to go through the house.

Q. And about what length of time have you known her to follow that occupation?

A. Well, that is the first time I ever saw her.

Q. That is two years ago? A. Yes, sir.

Q. And since then, you state that you have rescued three girls with Miss Cameron from this woman's house?

A. Yes, sir, two I think we got the other one from another place.

ANNA PHELPS,

Address: Police Department, Sacramento, California.

(The Interpreter informed Yee Moo of the testimony given by the witness. This detainant admitted that her name is Yee Moo. She claims that she is not the proprietor up there, but she was working for a living. She says it is not exactly a house of prostitution, but it is a lodging-house.)

[Statement of Rose Ying, Taken at Police Station,
Sacramento, Cal., October 17, 1913.]

STATEMENT OF

ROSE YING, daughter of Yee Moo, who, after being first duly sworn by the Inspector, testifies as follows, to wit:

Mr. ROBINSON.—Q. How old are you?

A. Fifteen.

Q. You born here in Sacramento?

A. Yes, sir; born in Sacramento.

Q. Is this lady your mother (referring to Yee Moo)? A. Yes, sir; that is my mother.

Q. She is commonly known here as Yee Moo?

A. Yes, sir.

Q. Do you know what your mother does for a living? A. She is only working in the house.

Q. Work there? A. Yes, sir.

Q. For whom?

A. Louie Ding; the house belongs to him.

Q. What is the number of the house?

A. I don't know the number of the house. I have never been there, so I don't know. [149]

Q. You never been there? A. No.

Q. You know the house,—what kind of a house,—what character?

A. No, I don't know the character of that house because I have never been there.

Q. You know how long your mother been working for Louie Ding?

A. I can't tell you exactly; about two or three years.

Q. About two or three years?

A. Yes, sir; something like that.

Q. She is still working for him now, is she?

A. Yes, sir; still working for him.

Q. And you know how much she get a month for working up there?

A. Twenty-five dollars a month.

Q. Twenty-five dollars a month? A. A month.

Q. Does she eat and sleep there?

A. No; she does not sleep; she go back to our house.

Q. But she does eat up there?

A. Yes, sir; she eats up there, but does not sleep there.

Q. Then about what time of the day your mother come home? A. I don't know that.

Q. Well, what time she come back home at night, you know? You folks be asleep,—you don't know?

A. I don't know; she comes home when I am asleep, and I don't know exactly what time.

ROSE YING.

Signature traced by Jos. E. Pipher.

Address:

(This witness speaks English, and the whole examination was taken in English.) [150]

State of California,

County of Sacramento,—ss.

I hereby certify that upon Friday, October 17, 1913, I took in shorthand writing, by direction of John A. Robinson, Inspector, the statements of James Weaver, E. R. Malone, Anna Phelps and Rose Ying in the matter above entitled; that I sub-

sequently personally transcribed my said shorthand notes into longhand typewriting, and the foregoing nine pages, together with this page, constitutes a full, true and correct transcription of my said shorthand writing, and is a full, true, correct, accurate and verbatim statement of testimony given by said named witnesses upon said October 17th, 1913, aforesaid.

Dated, Sacramento, October 21, 1913.

JOS. E. PIPHER,

Official Shorthand Reporter. [151]

[Letter, Dated January 3, 1914, "Commissioner" to
Commissioner-General of Immigration, Recommending That Warrant of Deportation Issue.]

DEPARTMENT OF COMMERCE AND LABOR.
IMMIGRATION SERVICE.

Office of the Commissioner,
Angel Island Station,
via Ferry Postoffice,
San Francisco, Cal.,

12020/190.

January 3, 1914.

Commissioner-General of Immigration,
Washington.

I have the honor to transmit herewith the record in the case of Ho Shee, *alias* Ho Shi, *alias* Haw Shee, who was arrested under authority of Departmental warrant No. 53575/255, dated April 11, 1913, charging her with being in the United States in violation of law.

This case first came to the notice of this office upon information furnished by Miss Donaldina Cameron, to the effect that the alien had been an inmate of her home and had made a statement as to her coming to

the United States and to having been an immoral woman since that time, as she then stated against her will. She subsequently ran away from Miss Cameron's, and her whereabouts were unknown for a long time. An anonymous communication however was received early in the year stating that she was leading an immoral life in the Republic Hotel. The matter was presented and warrant issued under date of April 11, and although reports were received from time to time indicating that she was practicing prostitution at various points in the state she was not located until the information was received which resulted in her being found in Sacramento about October 21, 1913. When this information was received officers were sent there and made the arrest of this woman, and [152] of another woman who 12020/190.

was afterwards released because the evidence was not thought to be strong enough to hold her. The place where she was said to be was raided by the officers, but by the time they got in it was found to be empty, and Ho Shee was arrested in a near-by store, being recognized through a photograph which this office was in possession of at that time, taken from her record when she was landed from the SS. "Siberia" October 14, 1912. At the examination October 21, the woman tells the usual story of her coming here as the wife of a native, and that her husband afterwards left her, and does not know his whereabouts. When questioned about being at the Mission she declined to answer even a simple question, which in my mind shows considerable evasiveness. When asked "Did you go there voluntarily"?

(meaning to Miss Cameron's mission) she answered, "I do not know." It also appears that there was a child in the case, which it was supposed belonged to her, but which she states belonged to her husband's first wife.

There is further introduced a statement of Miss Donaldina Cameron, who testifies that this woman, known under the name of Yut Kwai, stated that she was brought here as the wife of a native, and that she followed an immoral occupation before being admitted to the Home; furthermore, that she left the Home, not by going through the front door, as she stated, but by climbing over the fence at night. Also, Miss Tien Fuh Wu, testifies to the same effect.

After her arrest and while she was released on 12020/190.

bail, [153] information was received by this office that the Peking Hotel, formerly occupied by the Chinese six companies, was being used by Chinese prostitutes, as a house of prostitution, and a raid was conducted on about November 6, in which this woman was found together with a number of other Chinese women, two of whom were well-known Chinese prostitutes, of American birth, and others who were under arrest by this Service and out on bail, charged with being Chinese immoral women. So that her presence in the Peking Hotel is in keeping with the charge against her in other respects, and upon which the application for warrant of arrest was made. There is introduced in this connection copies of affidavits by Miss Donaldina Cameron, Miss Tien Fuh Wu, and Danied J. O'Brien, all testifying as to the

character of the Peking Hotel #770 Commercial Street, and in this connection I may state that the term, "house of prostitution" applied to the Peking Hotel is not intended to cover the hotel building as a structural or architectural unit, but that portion of it on the second and third floors which is run as the Peking Hotel, and which on the night of the arrest was occupied entirely by Chinese prostitutes, with these exceptions: an old man was found in the room of one of them, and two women apparently servants, and the manager, Louis Quong, of whom the Bureau is advised under another file.

In resisting deportation, counsel presents an affidavit of certain Chinese persons, stating that this woman was [154] known to have been a resident of Yreka, and that she came here about March, 1913, and lived for a period of about seven months; her husband, Low Kwai, being employed as a cook. Reference to her testimony, however, shows that she states she has never been in Yreka, that her husband is a merchant, and that she does not know where he is or where he has been, so that on the one hand there is her statement that she has never been to Yreka, although she states she was in another city, the name of which she does not know, with her husband, thus constituting somewhat of a discrepancy between the woman's own statement and the statement of her affidavits.

An affidavit of Ellsworth Tubbs, a resident of Yreka, is introduced, in which he states, "That I knew a woman whom I believe to be the woman whom the accompanying photograph represents," was a

resident of Yreka, and that he saw her during the summer of 1913. Of course this office has no knowledge of the photograph that was presented to him when he made the affidavit; in fact, the photograph on the affidavit which is presented, and the photograph that this office has are not particularly similar in appearance as will be seen through a comparison. There follows an affidavit of Fong Wing, a merchant of Yreka, in which he states that he knows Low Kwai and his wife Ho Shee, but here there is a lack of connection because there is no evidence before this office to show that the woman in custody is the woman Fong Wing is testifying for. Then follow a number of affidavits by Chinese persons unknown to this office, and which are in a usual stereotyped form, giving a good character in which [155] they may 12020/190.

be perfectly sincere as far as their information goes, but none of them offset the fact that the woman was originally rescued from the Oriental Hotel, where she admitted she was practicing prostitution, and that she was afterwards found in Sacramento in a near-by house well known to be that frequented by immoral people, and also that she was found in a hotel in San Francisco, all of the other occupants of which are believed to be prostitutes. There is a statement concerning one James Weaver, presented by the defense, but this office is not inclined to comment much upon that because it is believed that the testimony in the case is sufficient to establish the contention without reference to Weaver's affidavit, although the same accompanied the record, it having been

taken at the time of the Sacramento arrest. Then follows a long affidavit by the alien herself, denying most of the statements by Miss Cameron, and Miss Wu, and of course that is a matter of which the Honorable Secretary must pass upon as to which state the true facts. Two affidavits are produced by Chinese regarding the Peking Hotel, and this office has only to state in this instance as it has in other cases, that the character of the women found in that hotel on the night of the raid can leave no other conclusion possible, than that it is a house occupied by Chinese prostitutes.

After carefully considering the evidence in this case it is my judgment that Ho Shee is an alien here in violation of law, in that she has been leading an 12020/190.

immoral life and [156] has been found as an inmate of a house of prostitution. It is therefore recommended that a warrant of deportation issue.

Commissioner.

FHA/LM.

Inc. No. 12,572. [157]

[Letter, Dated January 7, 1914, Acting Commissioner-General to Commissioner of Immigration.]

(LETTER ACCOMPANYING WARRANT OF DEPORTATION.)

U. S. DEPARTMENT OF LABOR.

BUREAU OF IMMIGRATION.

Washington.

In answering refer to

No. 53575/255

(Time Stamp)

January 27, 1914.

12020

Commissioner of Immigration,

Angel Island Station,

San Francisco, Cal.

190

After a final review of the facts in the case of the Chinese alien Ho Shee, *alias* Haw Shee, *alias* Ho Shi, it is found that this girl is in the United States in violation of law and a warrant directing her deportation is inclosed herewith.

There is also transmitted herewith a copy of a memorandum for the Acting Secretary, indicating the grounds on which the Department reached its conclusions in the case.

F. H. LARNED,

Acting Commissioner-General.

Inclose. W/D No. 5310.

Inclo. No. 5311.

Me.

J. D. [158]

Warrant—Deportation of Alien.

UNITED STATES OF AMERICA.

U. S. DEPARTMENT OF LABOR.

Washington.

No. 53575/255. (Time Stamp) Inclo. No. 5310.

To SAMUEL W. BACKUS, Commissioner of Immigration, Angel Island Station, San Francisco, California.

Whereas, from proofs submitted to me, after due hearing before Immigrant Inspector W. H. Chadney, held at Angel Island Station, San Francisco, Cal., I have become satisfied that the alien Ho Shee, *alias* Haw Shee, *alias* Ho Shi, who landed at the port of San Francisco, Cal., per SS. "Siberia," on the 14th day of October, 1912, has been found in the United States in violation of the Act of Congress approved February 20, 1907, amended by the Act approved March 26, 1910, to wit: That the said alien is a prostitute and has been found practicing prostitution subsequent to her entry into the United States, and may be deported in accordance therewith:

I, J. B. Densmore, Acting Secretary of Labor, by virtue of the power and authority vested in me by the laws of the United States, do hereby command you to return the said alien to ———, the country whence she came, at the expense of the steamship company importing her.

For so doing, this shall be your sufficient warrant,

Witness my hand and seal this 27th day of January, 1914.

[Seal]

J. B. DENSMORE,
Acting Secretary of Labor.

Mc. [159]
53575/255.

Jan. 20, 1914.

MEMORANDUM FOR THE ACTING SECRETARY.

The attached record relates to the case of Ho Shee, *alias* Ho Shi, *alias* Haw Shee, a Chinese woman who is now being detained at Angel Island, San Francisco, under Departmental warrant of arrest as a prostitute, "found practicing prostitution subsequent to her entry into the United States." The record shows that she was admitted at San Francisco as the wife of an alleged citizen, Low Qwai, on October 14th, 1912. She was accompanied from China by Low Kwai and an alleged son, but a year or so old, but the latter proves now not to have been her own son, and she had no knowledge of its whereabouts at the time she testified on warrant proceedings before the immigration officials. The present claim is that the child was Low Kwai's by a former wife, but the record furnishes substantial reason for questioning this assertion and for believing that the child was brought along for the purpose of lending color to the claim that Ho Shee was really the wife of Low Kwai, a scheme which is not infrequently adopted in cases where the importation of a young Chinese woman as a slave girl or prostitute is sought.

Information as to the character of occupation be-

ing followed by Ho Shee was first reported to the San Francisco office by Miss Donaldina Cameron, Superintendent of the Presbyterian Chinese Mission Home. According to Miss Cameron's sworn statement, which statement is corroborated in all of its essential details by that of her assistant, Miss Tien Fuh Wu, Ho Shee was rescued by herself from the Oriental Hotel in San Francisco, on the basis of information furnished to the effect that she and another Chinese girl were being held in said hotel as slave girls and desired to be [160] rescued. She states in her testimony that Ho Shee remained in the Home for a short period (Tien Fuh Wu states for a couple of months) and then ran away; that during her stay in the Mission Home she "discussed freely her life in Chinatown as a slave girl and the hardships of that life, and told us who her owner was and also told us that the little child she brought over with her from China and landed as her son had been sold to a Chinese person"; that "from the girl's own admissions and the conditions under which we found her at the time we rescued her" she is convinced that Ho Shee is, in fact, a prostitute; and that the Oriental Hotel is known to her to be "a place where Chinese slave owners take them at night to practice their business." The sworn statement of Tien Fuh Wu adds that Ho Shee admitted that she had been practicing prostitution for more than a month in the Oriental Hotel, from which she was rescued, and that "ever since she left the Home we heard from various people that she was leading an immoral life."

The absolute integrity of Miss Cameron and the good work she is doing in the way of rescuing un-

fortunate slave girls from lives of shame and conditions so abhorrent as to beggar description and affording them an asylum under kindly care and Christian auspices, conducive to reformation, are matters known to the Department. It is perhaps only natural to expect that she would, under the circumstances, be maligned and wrong and improper motives (even base perjury) attributed to her by those whose interests are, either directly or remotely, affected or threatened to be affected. Note in the present case the assertion contained in the brief of San Francisco counsel that "the whole showing against this defendant (Ho Shee) seems to savor much of spite work and to be the result of the disappointment of the Mission people (Miss Cameron et al.) in not being able to keep this defendant in their Mission so that they can work out their own designs with her," and the [161] assertion of local counsel in his brief that "a raiding squad under the direction of Miss Donaldina Cameron, of the Presbyterian Mission, or her assistant Tien Fuh Wu, forcibly took possession of Ho Shee in her room and carried her to the Mission * * *," and the further assertion that upon Ho Shee's "escape" from the Mission she "joined her husband, Low Kwai, from whom she had been forcibly separated." These statements having been made, apparently with a view to discrediting Miss Cameron, it becomes pertinent to examine the record with a view to ascertaining just what the record shows by way of justification or in refutation of them.

In her sworn testimony before the immigration

inspector on warrant hearing Ho Shee testified that upon landing at San Francisco she and Low Kwai went to a lodging-house in San Francisco, where they lived together for a "short while," she does not remember how long, but "not very long," when her husband left her, but continued to send her money; that she does not know whether or not the name of the lodging-house where they stopped was the "Oriental Hotel"; that she does not know Miss Cameron or Miss Wu; that she "don't know" whether she went to the Mission Home voluntarily or not but she "came with the missionary woman"; that she does not know of another Chinese girl having been taken from the Oriental Hotel at the time she was and with her to the Mission Home; that she did not know the whereabouts of her husband at the time of her examination, and she does not know what her husband did with the boy they brought to this country; and that after leaving the Mission she lived with her husband in Sacramento, Calif. Subsequently she altered her statements in some respects as to the matter of her husband leaving her, stating that she went with him immediately after leaving the Oriental Hotel (doubtless meaning after she left the Mission, as the evidence is undisputed that she was taken from [162] the Oriental Hotel direct to the Mission); and she furthermore stated that she lived in another city, the name of which she did not know, for some time previous to going to Sacramento. About two months after she gave her testimony before the immigration officials she is made to state, in an affidavit which purports to have been signed by her, by mark, that she was taken from the Oriental

Hotel to the Presbyterian Mission Home by Miss Donaldina Cameron and her assistant "against her will and by force," and that another Chinese woman who occupied a room near hers was also taken to the Mission Home. From a reading of her testimony and this affidavit it is apparent that her mind was considerably freshened as to details incident to her whereabouts and doings after leaving the Mission Home, for she is able to recall that she spent some seven or eight months in Yreka, California, with her husband, and had been in Sacramento but a very few days when she was arrested. There is to be gathered from her testimony the fact that she did not know at that time whether she had been forcibly "abducted," from the Oriental Hotel, did not know just where she had spent practically all of her time since leaving said Home, and did not know, at the time of her arrest, the whereabouts of Low Kwai, notwithstanding her affidavit to the effect that they had been living together in Sacramento, as well as in Yreka.

The record further establishes that warrant for the arrest of Ho Shee first issued in April, last, but she appears not to have been taken into custody under said warrant until some time in October, when she was arrested in Sacramento, on the basis of information furnished the San Francisco office to the effect that she was practicing prostitution in that city. She was *enlarged* on bond, but was again taken into custody in November, on the basis of information furnished the San Francisco office to the effect that she was practicing prostitution in the Peking Hotel, 768-770 [163] Commercial Street, San

Francisco. The fact that the premises known as the Peking Hotel, or any portion thereof, is used as a place of prostitution is contested in the record, there being the customary number of affidavits, from Chinese sources unquestionably interested, to the effect that it is a *bona fide* family hotel, and used only for proper and legitimate purposes. Opposed to these *ex parte* assertions of interested Chinese parties are the sworn statements of Miss Donaldina Cameron to the effect that the premises known as the Peking Hotel are, by general reputation, known to her to be a Chinese house of prostitution, and that during the past six months several complaints have been lodged with her as to young Chinese girls being held at said "Hotel" for immoral purposes, the sworn statement of Miss Carrie G. Davis, Superintendent of the Methodist Chinese Girls' Home (an institution similar to the Presbyterian Chinese Mission Home) to the effect that during the past six months her attention has been frequently called to the premises known as the Peking Hotel, which is "generally known by reputation as a Chinese house of prostitution," and that the reputed manager of the Hotel, Louis Quong, has for many years been known, by reputation, as a dealer in slave girls, and the affidavit of Acting Sergeant of Police, Daniel J. O'Brien, to the effect that from July 19, 1913, to November 14, 1913, he was in charge of the police detailed in Chinatown, and by reason of said detail he knows "the premises at No. 770 Commercial Street, the Hotel Peking, by general reputation to be a place where Chinese prostitutes gathered and

where prostitution was practiced," and the fact that the immigration officials, in raiding the Peking Hotel as a result of which Ho Shee (with others) was taken in custody, found the portion of the building which is run as the Peking Hotel "occupied entirely by Chinese prostitutes, with these exceptions: An old man was found in the room of one of them, and two women apparently servants, and the manager, Louis Quong." Elsewhere in the report of the San [164] Francisco office appears the statement that a number of Chinese women, other than the defendant, were found in the premises, two of whom were well known Chinese prostitutes, of American birth, and others, under arrest by this service and out on bail, charged with being Chinese immoral women. The fact that so many Chinese women, some of whom were known to be prostitutes and others, for good cause suspected of being prostitutes, were found in the building, constitutes a substantial refutation of the averments contained in the affidavits, above commented upon, to the effect that the premises is strictly a "family hotel," used only for hotel purposes. It is deemed not inappropriate to state at this time that this so-called "hotel" is adjoined on either side by houses of prostitution, and the present by no means constitutes the first case which has been before the Department in which its inmates have been represented to be alien Chinese prostitutes, and as such subject to deportation under the laws of the United States. Furthermore, Ho Shee's presence in this so-called "hotel" is in absolute keeping with the other facts and circumstances apparent from the record,

from a reading of which a disinterested person could not escape the impression (amounting to a conviction) that she is a prostitute and the "hotel" itself is used as a place of prostitution.

As above indicated, the woman was first arrested in Sacramento, on the basis of information furnished the San Francisco office to the effect that she was practicing prostitution in that city. At the time of her arrest the statement of one James Weaver was taken by the inspector. Briefly, Mr. Weaver testified (under oath) that his assignment covered what is commonly known as the "tenderloin" district in Sacramento; that this district comprised all of "Chinatown"; that he recognizes Ho Shee (who was produced before him in person) as "being one of the inmates of a Chinese house of [165] prostitution at 410½ in the alley"; that he had known this woman to be a prostitute in Sacramento for approximately three months, "all of which time she has been continually an inmate of a house of prostitution"; and that he has seen her in bed, partly disrobed, with various Chinese persons. An effort is made to impeach the testimony of this witness by introducing in evidence certain newspaper clippings tending to show that he was recently accorded a trial in Sacramento on a charge (apparently) of alienating the affections of another man's wife and of having had improper relations with her, as a result of which he was suspended from the police force of the city.

Whatever truth there may be in the assertions, of which counsel endeavors to make considerable, the fact remains that the case was dismissed in the Police

Court and Weaver was returned to the position of police officer formerly occupied by him. His veracity does not appear to have been at issue or questioned at the time, and the Bureau knows of no reason why his testimony should not be accepted and weighed in the light of whatever other developments there may be in the case. It should be remembered in this connection that his statements are in line with information received from a number of sources to the effect that Ho Shee was a prostitute, was twice found in resorts known to be places at which prostitution ply their calling, and finally with the information received by the San Francisco office prior to the time Weaver made his statement and before an officer was sent to Sacramento, that she was practicing prostitution in Sacramento. To meet this testimony there is submitted a number of *ex parte* affidavits, bearing indications of having been prepared by some one intimately familiar with the facts of record in the case and the points it was desired to disprove thereby, the signers of the majority of which probably had little to do with them other than affixing their signatures. The purpose [166] of these affidavits is apparently to prove that Ho Shee was not in Sacramento for more than a very few days of the time Officer Weaver claims he knew her to be a prostitute in that city, but was living in Yreka during that time. One of these affidavits was executed by a white person signed as Ellsworth Tubbs, who states that he knew a woman "whom I believe to be the woman whom the accompanying photograph represents," which woman he saw in Yreka many times "last summer," and who was on the same "train and car" with him-

self "when she went South October 8, 1913" (affidavit formerly stated August 8, 1913, but the word "October" was written over the typewritten word "August" by the Notary before whom the affidavit was executed). The remainder of the affidavits (nearly all by Chinese persons) are devoted to statements to the effect that Ho Shee lived with her husband in Yreka for possibly seven months, up until some time early in October, and that she conducted herself in a manner "eminently respectable and praiseworthy."

A circumstance for consideration in connection with this case, aside from the evidence which the record contains, is the fact that Low Kwai has at all stages of the case kept in the background, has not come forward to offer testimony in behalf of his alleged wife, to whom, it is stated in an affidavit finally submitted (which purports to have been executed by him), he is "devotedly attached," and not a single witness has been offered at the San Francisco office to give the testimony in behalf of the woman.

As stated in the letter of the Commissioner, with which the case was transmitted to the Bureau, there is no certainty that the numerous parties who have executed *ex parte* affidavits alleging that the woman Ho Shee has always lived a respectable life, was not in Sacramento at the time Police Officer Weaver claims he knew her [167] to be a prostitute there, and did not follow the calling of a prostitute at the Oriental and Peking "hotels" in San Francisco, had in mind at the time the particular party who is now under arrest. The Bureau does not know, and there

is no means of satisfactorily ascertaining, under just what circumstances these affidavits were executed, and but little, if any, value as evidence can be ascribed to them. The various letters of counsel, and their briefs as well, contain no explanation of the failure to produce the alleged husband, or even a single witness, to give testimony in the woman's behalf and in support of their affidavits, which have been drawn with such care, and with a view to annihilating, step by step, each and every bit of damaging evidence which has been obtained.

In the Bureau's opinion the evidence clearly establishes, beyond a reasonable doubt, that Ho Shee is guilty of the charges specified in the warrant on which she was arrested, and that she is now in the United States in violation of law and properly a subject of deportation. It accordingly recommends that formal warrant for her deportation issue.

WJP-c Acting Commissioner-General. [168]

(Bond on Appeal.)

KNOW ALL MEN BY THESE PRESENTS, That we, Ho Shee, as principal, and Illinois Surety Company, as sureties, are held and firmly bound unto the United States of America in the full and just sum of five hundred *dollars* (500) dollars, to be paid to the said United States of America, certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 25th day of November, in the year of our Lord one thousand nine hundred and fourteen.

WHEREAS, lately at a District Court of the United States for the Northern District of California, First Division, in a matter depending in said Court, for a writ of habeas corpus an order was entered against the said Ho Shee denying the petition for a writ of habeas corpus in her behalf and the said Ho Shee having obtained from said Court an order allowing an appeal to reverse the said order in the aforesaid matter and a citation directed to the respondent Samuel W. Backus, Commissioner of Immigration for the Port of San Francisco, State of California citing and admonishing him to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California.

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, That if the said Ho Shee shall prosecute her said appeal to effect, and answer all damages and costs if she fail to make her plea good, then the above obligation to be void; else to remain in full force and virtue. [169]

ILLINOIS SURETY COMPANY. (Seal)

(Chinese Character) (HO SHEE.) (Seal)

By HAROLD PARSONS, (Seal)

Its Attorney in Fact.

Acknowledged before me the day and year first above written.

[Seal]

FRANCIS KRULL,

United States Commissioner, North'n Dist. of California.

[Endorsed]: Filed Nov. 25, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [170]

*In the District Court of the United States for the
Northern District of California.*

No. 15,591.

In the Matter of Mrs. LOW KWAI, Sometimes
Known as HO SHEE, or HO (HAW) SHEE,
on Habeas Corpus.

Stipulation to Correctness of Translations.

It is hereby stipulated and agreed by and between
the respective parties hereto that the annexed trans-
lations from Chinese to English of the two attached
defendant's exhibits in Chinese characters, are true
and correct translations.

WM. HOFF COOK and

GEORGE A. McGOWAN,

Attorneys for Petitioner and Appellant.

WALTER E. HETTMAN,

Attorney for Respondent and Appellee. [171]

**[Translation in English of Defendant's Exhibit in
Chinese.]**

This Hotel is situated at Number 770 Commercial
Street, San Francisco, in the Six Companies Build-
ing. All rooms are thoroughly ventilated and well
lighted with electricity. Hot and cold water are
piped to the rooms and may be used at will. Bath
rooms and toilets always clean. Beds and bedding,
mirrors, stands, chairs, tables, rugs to match, and all
very beautiful. Services will always be found satis-

factory. Everything is sanitary, as is well known to our patrons. Room rent is reckoned by the day, month or week, and is most reasonable. We trust the traveling public will bear this in mind and favor us with patronage. 'Phone China 785 and 686. Peking Hotel. Managers: Mah Yuek Wai and Tom Hay Tong.

ATTENTION!

The Birth of the Great Oriental Hotel.

The proprietor of this Hotel drew the plans for it himself, and is newly built. It is a large building of four stories, situated at the corner of Clay and Stockton, and is numbered 856—opposite the Six Companies Building. The rooms are thoroughly ventilated and well lighted with electricity. Hot and cold water both convenient. Beds and bedding, mirrors, stands, chairs, tables, carpets are all beautiful and sanitary. Bath rooms and toilets always clean. Room rent is reckoned by the day or month and is always on the reasonable side. The public, either traveling or returning to China, stopping off here temporarily, will be served satisfactorily. If notified beforehand we will welcome our patrons at the station. Those who have patronage to extend we hope will bear us in mind. 'Phone China 173. The Yuen Tung Commercial Hotel. President, Wong Suey Jung. [172]

[Endorsed]: Filed Nov. 24, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [173]

*In the District Court of the United States, in and
for the Northern District of California, Division
No. 1.*

No. 15,591.

In the Matter of the Application of LOW KWAI,
upon Behalf of Mrs. LOW KWAI, Some-
times Known as HO SHEE, or HO (HAW)
SHEE, on Habeas Corpus.

**Order Extending Time to [September 10, 1914, to]
Docket Case.**

Good cause appearing therefor, and upon motion
of George A. McGowan, Esquire, attorney for the
petitioners and appellants herein, it is hereby or-
dered that the said petitioners be and they hereby
are allowed three (3) days' additional time from and
after the 7th day of September, 1914, within which
to docket the above-entitled case upon the Citation
heretofore filed in said cause, in the office of the Clerk
of the Circuit Court of Appeals in and for the Ninth
Judicial Circuit.

Dated at San Francisco, September 8th, 1914.

WM. C. VAN FLEET,
United States District Judge.

Service of the within order, and receipt of a copy
thereof is hereby admitted this 8th day of Septem-
ber, A. D. 1914.

WALTER E. HETTMAN,
Asst. United States Attorney.

[Endorsed]: Filed Sep. 8, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [I74]

*In the District Court of the United States, in and
for the Northern District of California, Division
No. 1.*

No. 15,591.

In the Matter of the Application of LOW KWAI,
upon Behalf of Mrs. LOW KWAI, Some-
times Known as HO SHEE, or HO (HAW)
SHEE, on Habeas Corpus.

**Order Extending Time to [October 10, 1914, to]
Docket Case.**

Good cause appearing therefor, and upon motion of George A. McGowan, Esquire, attorney for the petitioners and appellants herein, it is hereby ordered that the said petitioners be and they hereby are allowed thirty days' additional time from and after the 10th day of September, 1914, within which to docket the above-entitled case, upon the Citation heretofore filed in said cause, in the office of the Clerk of the Circuit Court of Appeals in and for the Ninth Judicial Circuit.

Dated at San Francisco, Calif., Sept. 10th, 1914.

M. T. DOOLING,

United States District Judge.

Service of the within order, and receipt of a copy thereof is hereby admitted this 10th day of September, A. D. 1914.

JNO. W. PRESTON,

United States Attorney.

[Endorsed]: Filed Sep. 10, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [175]

*In the District Court of the United States, in and
for the Northern District of California, Division
No. 1.*

No. 15,591.

In the Matter of the Application of LOW KWAI,
upon Behalf of Mrs. LOW KWAI, Some-
times Known as HO SHEE, or HO (HAW)
SHEE, on Habeas Corpus.

**Order Extending Time to [October 25, 1914, to]
Docket Case.**

Good cause appearing therefor, and upon motion
of George A. McGowan, Esquire, attorney for the
petitioners and appellants herein, it is hereby or-
dered that the said petitioners be and they hereby
are allowed fifteen days' additional time from and
after the 10th day of October, 1914, within which to
docket the above-entitled case, upon the Citation
heretofore filed in said cause, in the office of the
Clerk of the Circuit Court of Appeals in and for
the Ninth Judicial Circuit.

Dated at San Francisco, Calif., Oct. 10th, 1914.

M. T. DOOLING,

United States District Judge.

Service of the within Order and receipt of a copy
thereof is hereby admitted this 10th day of Oct. 1914.

J. W. PRESTON,

U. S. Atty.

[Endorsed]: Filed Oct. 10, 1914. W. B. Maling,
Clerk. By T. L. Baldwin, Deputy Clerk. [176]

*In the District Court of the United States, in and
for the Northern District of California, Division
No. 1.*

No. 15,591.

In the Matter of the Application of LOW KWAI,
upon Behalf of Mrs. LOW KWAI, Some-
times Known as HO SHEE, or HO (HAW)
SHEE, on Habeas Corpus.

**Order Extending Time to [November 9, 1914, to]
Docket Case.**

Good cause appearing therefor, and upon motion of George A. McGowan, Esquire, attorney for the petitioners and appellants herein, it is hereby ordered that the said petitioners be and they hereby are allowed fifteen days' additional time from and after the 25th day of October, 1914, within which to docket the above-entitled case, upon the Citation heretofore filed in said cause, in the office of the Clerk of the Circuit Court of Appeals in and for the Ninth Judicial Circuit.

Dated at San Francisco, October 24, 1914.

M. T. DOOLING,

United States District Judge.

Service of the within order and receipt of a copy thereof is hereby admitted this 24th day of October, 1914.

J. W. PRESTON,

U. S. Atty.

[Endorsed]: Filed Oct. 24, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [177]

*In the United States District Court, Northern
District of California, First Division.*

No. 15,591.

In the Matter of LOW KWAI, Sometimes Known
as HO SHEE or HOW SHEE, on Habeas
Corpus.

**Order Extending Time to [November 29, 1914, to]
File Record on Appeal.**

Good cause appearing therefor by reason of the fact that the record on appeal has not been transmitted to the Court of Appeal, owing to the fact that at the request of the United States Attorney the Court made an order recently directing the Clerk to add several other papers to the record on appeal herein, and that compliance with such order will require some additional time, it is hereby ordered that the appellant may have 20 days' further time from and after the date hereof within which to lodge and file the record on appeal herein in the Court of Appeals.

Dated: November 5, 1914.

M. T. DOOLING,
District Judge.

[Endorsed]: Filed Nov. 5, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [178]

**[Certificate of Clerk U. S. District Court to
Transcript of Record.]**

I, W. B. Maling, Clerk of the District Court of
the United States, for the Northern District of Cali-

fornia, do hereby certify that the foregoing 178 pages, numbered from 1 to 178, inclusive, contain a full, true and correct Transcript of certain records and proceedings, in the matter of Mrs. Low Kwai, sometimes known as Ho Shee, etc., on Habeas Corpus, Number 15,591, as the same now remain on file and of record in the office of the Clerk of said District Court; said Transcript having been prepared pursuant to and in accordance with "Praecipe for record on Appeal" and "Order to complete Transcript on Appeal" (copies of which are embodied in this Transcript), and the instructions of Wm. Hoff Cook, Esquire, attorney for petitioner and appellant herein.

I further certify that the costs of preparing and certifying the foregoing Transcript on Appeal is the sum of eighty-nine dollars and forty cents (\$89.40), and that the same has been paid to me by the attorney for the appellant herein.

Annexed hereto is the Original Citation on Appeal issued herein (paged 180 and 181).

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 25th day of November, 1914.

[Seal]

W. B. MALING,
Clerk.

By C. W. Calbreath,
Deputy Clerk.

CMT. [179]

(Citation on Appeal—Original.)

UNITED STATES OF AMERICA,—ss.

The President of the United States, to Hon. SAMUEL W. BACKUS, Commissioner of Immigration, Port of San Francisco, and to His Attorney, JOHN W. PRESTON, United States Attorney in and for the Northern District of California, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California, Division No. 1, thereof, wherein Low Kwai and Mrs. Low Kwai, sometimes known as Ho Shee or Ho (Haw) Shee, are appellants, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable MAURICE T. DOOLING, United States District Judge for the Northern Dist. of California, this 10 day of August, A. D. 1914.

M. T. DOOLING,

United States District Judge. [180]

[Endorsed]: No. 15,591. United States District Court for the Northern District of California. Low Kwai and Mrs. Low Kwai, Sometimes Known as Ho Shee or Ho (Haw) Shee, Appellants, vs. Samuel W. Backus, Commissioner of Immigration, Appellee. Citation on Appeal. Filed Aug. 10, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

Service of the within Citation, appeal and receipt of a copy thereof is hereby admitted this 10th day of Aug., 1914.

WALTER E. HETTMAN,
Asst. U. S. Atty.

[181]

[Endorsed]: No. 2522. United States Circuit Court of Appeals for the Ninth Circuit. Low Kwai and Mrs. Low Kwai, Sometimes Known as Ho Shee or Ho (Haw) Shee, Appellants, vs. Samuel W. Backus, as Commissioner of Immigration, Port of San Francisco, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, First Division.

Received and filed November 25, 1914.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

No. 2522

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LOW KWAI and MRS. LOW KWAI, some-
times known as Ho SHEE or Ho (HAW)
SHEE,

Appellants,

vs.

SAMUEL W. BACKUS, as Commissioner of
Immigration, Port of San Francisco,

Appellee.

BRIEF FOR APPELLANTS.

Filed

JUN 14 1915

F. D. Monckton,
Clerk.

WM. HOFF COOK,

GEO. A. MCGOWAN,

Attorneys for Appellants.

Filed this.....day of May, 1915.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

No. 2522

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LOW KWAI and MRS. LOW KWAI, some-
times known as Ho SHEE or Ho (HAW)
SHEE,

Appellants,

vs.

SAMUEL W. BACKUS, as Commissioner of
Immigration, Port of San Francisco,

Appellee.

BRIEF FOR APPELLANTS.

This is an appeal from an order made by the District Court, discharging a writ of habeas corpus, and remanding Ho Shee, under a warrant for her deportation to China, by the immigration officers.

The record shows that she entered the United States, as the wife of Low Kwai, a native born citizen, on or about October 14, 1912, and that on April 2, 1913, the Acting Commissioner, at San Francisco, recommended to the Secretary of Labor, that a warrant for the arrest of Ho Shee issue; and said

recommendation is based solely upon the recital therein (Trans. Record, p. 17) that:

“It is stated from an anonymous source that this woman is now practicing prostitution in either the Oriental Hotel or the Republic Hotel, keeping one of the rooms in either hotel from time to time.”

Upon this recommendation a warrant was issued reciting, as a fact, based solely upon the foregoing recommendation,

“that the said alien is a prostitute and has been found practicing prostitution subsequent to her entry into the United States.”

If such a finding of fact is a fair finding, based upon an anonymous communication, then the liberty of no one is safe; in fact the immigration officers only seem to lend themselves to issuing warrants for the arrest of Chinese, upon anonymous information, whereas, in the case of other aliens, they require a sworn affidavit, as the basis of issuing a warrant.

We, therefore, contend that the Secretary of Labor had no right or authority to issue the warrant of arrest, without a proper sworn affidavit or complaint, as the basis thereof, and that all subsequent proceedings, had upon such invalid warrant of arrest, are null and void; there can be no doubt that if, this letter of recommendation for a warrant, and the warrant, were the entire authority for the detention of Ho Shee, that she would be entitled to her discharge upon habeas corpus; and we respect-

fully submit that as the initial proceedings for the arrest of Ho Shee were, and are, invalid, that no proceedings should have been had thereon, and, therefore, that all of the ex parte proceedings, had by the immigration officers, are, and were, invalid, besides being clearly unfair.

This invalid warrant was issued on April 11, 1913 (Trans. Record, p. 19), and this warrant was not executed until October 17, 1913, when Ho Shee was arrested in Sacramento upon the street.

On October 20, 1913, these immigration officers go through an ex parte proceeding, which they claim is perfectly fair, but which in our opinion, is a real "star chamber proceeding", and in which certain ex parte statements are made by Tien Fuh Wah and Dondalina Cameron; and then Ho Shee is asked a number of questions, with no attorney present, and without being first advised as to her right to an attorney, and then, as a sort of "*fair peroration*" the inspector says (Trans. Record, pp. 32 and 33):

"Pursuant with instructions contained in Departmental Warrant dated April 11, 1913, you are now brought before me, an immigration inspector, to show cause, why you should not be deported as an immoral person having been found practicing prostitution subsequent to your entry into the United States. You are advised that you have the right to be represented by counsel and that your attorney may inspect the record."

Under some of the decisions everything that took place prior to the "last gasp admonition" of the inspector would be held to be *some* evidence to sustain the issuance of a warrant of deportation.

It is difficult for us to understand how any such procedure can be sustained as a fair hearing, and as justifying a warrant of deportation.

Surely if this Ho Shee were before a committing magistrate, for a preliminary examination, and he was by law directed to advise her of her right to be represented by counsel, and that, in spite thereof, that the committing magistrate proceeded to examine witnesses, and herself, without the presence of counsel, and, thereafter, at the conclusion of such examination, advised her of her right to counsel, and then ordered her held to answer for the offense charged, certainly no Court would hold that such was a fair proceeding, or a legal examination.

We contend therefore that everything that transpired, prior to the admonition of the inspector, should be eliminated, and if such testimony, and the testimony and statements of the witnesses Weaver, Malone, Anna Phelps and Rose Ying, taken *ex parte* in Sacramento, on October 17, 1913 (Trans. Record, pp. 153 et seq.) are also eliminated, then there is absolutely no evidence, of any kind, to sustain the conclusions of the immigration officers, directing the warrant of deportation to issue.

Ex parte Bang Shew, 220 Fed. Rep. 387.

Exceptions and protest were duly taken and made by Mr. McGowan, as attorney for Ho Shee, at dif-

ferent subsequent stages of the immigration proceedings (Trans. Record, p. 103). The record shows that Mr. McGowan presented affidavits (which were the only means afforded him for presenting any testimony), which established the fact that no warrant of deportation should be issued in this case, and the record itself shows that the counsel for Ho Shee was denied the right and privilege of cross-examining any witness, who had made any affidavit, on behalf of the immigration authorities.

We respectfully ask, in connection with this proof, that the Court consider the brief on behalf of defendant, presented to the department, beginning at page 108 of the Transcript of the Record, and also at page 120 thereof.

We contend in this action that the Secretary of Labor was without authority or jurisdiction to issue the original warrant of arrest, or to direct the deportation of Ho Shee, because there was no evidence or proof upon a fair hearing to sustain the charge made in the original warrant, or the finding in the order of deportation, and without such proof the proceeding, and warrant, were void, and with no legal effect.

Ex parte Lam Pui, 217 Fed. Rep. 456.

From the very inception of the proceedings, for the arrest and deportation of Ho Shee, her rights seem to have been entirely disregarded, and the immigration authorities seem to have assiduously put into the record a lot of ex parte statements, or affidavits, in entire disregard of the rules of the De-

partment to the effect that before any testimony is taken, that the party should be advised of her right to counsel, and that counsel should have the right to be present at all of the proceedings.

These immigration officers seem to rely upon the fact that, if they can get ex parte affidavits, or statements, into the record, tending in any degree to establish that the party complained of is an undesirable alien, that their sole purpose will then be accomplished for enforcing the deportation of such alien, in reliance upon the decisions of the Courts, that the finding of immigration officers is final, and not reviewable in judicial proceedings.

We submit that no such ex parte statements, which are the basis, and sole support, of the warrant of deportation, in this action, should be approved by this Court, or be given the stamp of judicial approval, as being the result of a "*fair hearing*", and that this Court should, by its decision in this case, determine and decide, that no hearing is fair, which is based solely upon ex parte statements, taken before the alien is advised of her right to have counsel present, or taken ex parte, and without the opportunity of such counsel to cross-examine the witnesses.

As demonstrated in this case all of the testimony claimed to justify the warrant of deportation was taken upon oral questions and answers, and not by affidavits, and was taken ex parte, and in denial of the right to Ho Shee to have her counsel present, and in fact, *all of such testimony* had been taken

before she was even advised that she had the right to be represented by counsel.

We earnestly recommend, therefore, that the judgment in this case be reversed.

Dated, San Francisco,

May 12, 1915.

Respectfully submitted,

WM. HOFF COOK,

GEO. A. MCGOWAN,

Attorneys for Appellants.

No. 2522.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

LO KWAI and MRS. LO KWAI, Some-
times Known as Ho Shee or Ho (Haw)
Shee,

Appellants,

vs.

SAMUEL W. BACKUS, as Commissioner
of Immigration, Port of San Francisco,

Appellee.

BRIEF FOR APPELLEE

JOHN W. PRESTON,
United States Attorney,

WALTER E. HETTMAN,
Assistant United States Attorney,
Attorneys for Appellee.

Filed this day of July, 1915,

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

No. 2522.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

LO KWAI and MRS. LO KWAI, Sometimes Known as Ho Shee or Ho (Haw) Shee,

Appellants,

vs.

SAMUEL W. BACKUS, as Commissioner of Immigration, Port of San Francisco,

Appellee.

BRIEF FOR APPELLEE

FACTS.

The facts of this case together with a discussion of the evidence are set forth in the memorandum for the Acting Secretary (Trans. 173-183). The record further shows (Trans. 172) that this alien woman has been duly ordered deported upon the warrant of deportation for being an alien unlawfully in the United States (Trans. 172) with the provision, "that the alien Ho Shee, alias Haw Shee, alias Ho Shi, who

landed at the port of San Francisco, Cal., per SS. 'Siberia' on the 14th day of October, 1912, has been found in the United States in violation of the Act of Congress approved February 20, 1907, amended by the Act approved March 26, 1910, to-wit: "That the said alien is a prostitute and has been found practicing prostitution subsequent to her entry into the United States and may be deported in accordance therewith."

Counsel for the alien in his brief has urged various grounds upon which he claims the hearings before the Bureau of Immigration were unfair. On pages 2 and 3 of his brief he assigns as a point of error that the issuance of the warrant of arrest upon an anonymous communication was a violation of the immigration rules and regulations and beyond the prerogative of the Secretary of Labor. It is not intended on behalf of the respondent to justify the procedure of arresting an alien basing a warrant upon anonymous information, nor did the District Court (Trans. 138) sanction such procedure in rendering its decision and discharging the writ of *habeas corpus*. The following is quoted from the court's decision:

"The record herein having been carefully considered, I am of the opinion that within the law as laid down in the adjudicated cases, the order of the Secretary of Labor directing the deportation of Ho Shee cannot be disturbed by the Court. By this, however, the Court does not desire to be understood as approving the issuance of a warrant of arrest upon 'anonymous information'. If we were dealing here only with the warrant of arrest I would have no hesitancy in ordering the woman's discharge. But the case has progressed

far beyond the original warrant of arrest, and in the subsequent proceedings the officers seem to have kept within the somewhat elastic bounds, by which their actions are, under the law and the adjudications, freed from strict control."

The Secretary, however, in issuing the warrant, accompanied it with a letter (Trans. 19) in which he ordered that the warrant should not be executed unless an investigation developed facts justifying such action. That this direction of the Secretary was faithfully and carefully observed is at once apparent from the fact that the alien was not arrested under the warrant until October 17, 1913, when it appeared she was practicing prostitution in Sacramento from the statements of the following: James Weaver (Trans. 40 and 153), E. R. Malone (Trans. 157), Anna Phelps (Trans. 159) and Rose Ying (Trans. 163). Even if the alien had been arrested before sufficient evidence had been secured to justify the issuance of the warrant, she could nevertheless be deported if evidence secured in the subsequent proceedings showed that she was subject to expulsion under the law. The technical rules of pleading essential in criminal proceedings have no application in a summary, executive proceeding of this nature. It is deemed necessary to cite only a few of the many decisions by which this principle has been firmly established in immigration cases.

Ekiu vs. U. S., 142 U. S. 65, 58 L. ed. 1146;

Ex parte Hamaguchi, 161 Fed. 185;

Ex rel Rosen vs. Williams, 200 Fed. 538;

U. S. vs. Williams, 175 Fed. 274;

Bauder vs. Uhl et al., 211 Fed. 628;

Frick vs. Lewis, 233 U. S. 289, 58 L. ed. 967.

The statement on page 3 that the alien was not advised of her right of counsel until after preliminary hearing before the Bureau of Immigration cannot be cited as unfair since such procedure is entirely in accordance with Rule 22 4-b of the Immigration Rules and Regulations and the decision of the Supreme Court in the case of *Lo Wah Suey vs. Backus*, 225 U. S. 460, 32 Sup. Ct. 734, 56 L. ed. 1165.

That a hearing before the Bureau of Immigration upon a warrant of arrest of an alien may consist almost entirely of *ex parte* affidavits has been repeatedly determined by the courts to constitute a fair hearing even though no opportunity for a cross examination was afforded.

Ex parte Pouliot, 196 Fed. 437;
Ex parte Garcia, 205 Fed. 53;
In re Jem Yuen, 188 Fed. 350.

In the case of *Choy Gum vs. Backus*, No. 2475, this Court on May 10, 1915, filed an opinion by Judge Wolverton which most carefully reviewed all the recent authorities upon the question of fairness of an immigration hearing by *ex parte* affidavits and also on the point of the right of cross-examination in such proceedings and this decision emphatically determined these points in favor of the respondent.

Respectfully submitted,

JOHN W. PRESTON,
 United States Attorney,

WALTER E. HETTMAN,
 Assistant United States Attorney.

Dated July 15, 1915.

United States
Circuit Court of Appeals
For the Ninth Circuit.

JOHN HEGNESS,

Appellant,

vs.

EUGENE CHILBERG,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for
the District of Alaska, Second Division.

Filed

DEC 14 1914

F. D. Anderson,

United States
Circuit Court of Appeals
For the Ninth Circuit.

JOHN HEGNESS,

Appellant,

vs.

EUGENE CHILBERG,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for
the District of Alaska, Second Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys of Record.

WILLIAM A. GILMORE, Nome, Alaska,
GEORGE B. GRIGSBY, Nome, Alaska,
Attorneys for Plaintiff.

G. J. LOMEN, Nome, Alaska,
IRA D. ORTON, Nome, Alaska,
Attorneys for Defendant.

*In the District Court for the District of Alaska,
Second Division.*

EUGENE CHILBERG,

Plaintiff,

vs.

JOHN HEGNESS,

Defendant.

Bill of Exceptions.

BE IT REMEMBERED that on July 3d, 1914, complaint was filed herein in words and figures as follows: (Title of court and cause omitted in all papers herein contained, being in all cases the same as the title of the court and cause of this Bill of Exceptions).

Complaint.

(Title Court and Cause.)

Comes now the plaintiff above named and for cause of action against the above-named defendant alleges as follows:

I.

That on or about the 25th day of August, 1909, the

plaintiff and defendant at Nome, Alaska, made, executed, delivered and entered into the following written agreement:

[Agreement, August 25, 1909, Between Chilberg and Hegness.]

“MEMORANDUM OF AGREEMENT, made and entered into this 25th day of August, 1909, by and between EUGENE CHILBERG of Nome, Alaska, party of the first part, and JOHN HEGNESS, also of Nome, Alaska, party of the second part,

WITNESSETH:

THAT, WHEREAS, the parties hereto are desirous of securing mail contract to carry the United States mail between Nome, Alaska, and Unalakleek, Alaska, and are desirous of bidding upon Proposal Route No. 78136 and Proposal Route No. 78137, in the name of the party of [1*] the second part; and,

WHEREAS, the parties are desirous of forming a copartnership for the purpose of operating the said mail routes, or either of them, should the said contracts be obtained, and are desirous of evidencing the terms of their said copartnership in writing;

NOW, THEREFORE, for and in consideration of the mutual promises and other good considerations, it is agreed between the parties hereto as follows:

First. That each of the parties hereto shall endeavor so far as he can to obtain the said contracts above mentioned, or either of them, and to that end

*Page number appearing at foot of page of original certified Record.

the party of the first part agrees to advance all necessary funds needed for such purpose and to obtain the bond required in the proposals for said mail routes, and if either or both of said contracts are secured, party of the first part agrees to furnish the necessary bond required by the Government therefor, and to advance the necessary money to begin and operate the said mail route or routes under the said contract or contracts until the payments are made by the Government according to the contract or contracts.

Second. Party of the second part agrees to furnish his own dog team, sled and equipment and give his personal service as a carrier on said route or routes, and shall reside when not on the mail route, in the Town of Nome, and give his personal attention and supervision to the fulfillment and carrying out of said contract or contracts, if the same is obtained in his name as bidder.

Third. That the party of the second part shall receive the same compensation for his personal services for his attention to the said work as the other carriers employed by this partnership, and shall receive in addition thereto fifteen per cent (15%) of the net profits derived or made from the said contract or contracts, after all other expenses are paid.

Fourth. That the party of the first part for his share shall receive eighty-five per cent (85%) of the net profits derived or made from the said contract or contracts after all expenses are paid for operating the same.

Fifth. That all warrants issued and delivered by

the Government in payment under the said contract or contracts shall be signed by the party of the second part and delivered to the party of the first part, or his representative or agent, who shall keep a strict and accurate account of the same and act as treasurer of the partnership.

IN WITNESS WHEREOF the said parties hereto have hereunto set their hands and seals the day and year first above written.

(Signed) EUGENE CHILBERG [Seal]

(Signed) JOHN HEGNESS. [Seal]

Signed, sealed and delivered in the presence of:

(Signed) WILLIAM A. GILMORE.

(Signed) MABEL SEARL." [2]

II.

That thereafter the plaintiff and defendant, in the name of the defendant, in accordance with the terms of said agreement, obtained the United States mail contract for carrying United States mail between Unalakleet, Alaska, and Nome, Alaska, for a period of four years, at the rate of sixteen thousand dollars (\$16,000.00) per year, said contract to expire in the summer of 1914; that in and by said contract between the plaintiff and defendant, it was contemplated and understood that the said copartnership should embrace and include all United States mail secured or handled over the said route between the said points, during the term of said copartnership.

IV.

That the said mail contract was secured from the United States Government for the plaintiff and defendant under the terms of said copartnership agree-

ment, through the efforts of the plaintiff and without any aid or assistance from said defendant; that thereafter, the plaintiff obtained and furnished the bond required by the United States Government and advanced the necessary money and made such financial arrangements that plaintiff and defendant were able to and did comply with all the terms and conditions of the said contract with the United States Government during the term of said mail contract; that immediately after obtaining said contract from said United States Government plaintiff and defendant mutually agreed that the Pacific Cold Storage Company, a corporation, doing business at Nome, Alaska, should act as the agent of the parties and as treasurer and auditor thereof, and receive all warrants from the United States Government properly endorsed by the defendant, and to pay all bills of said copartnership, and to render an accounting to the plaintiff and defendant at the end of each mail season, in accordance with the terms of the said written agreement of copartnership; that thereafter the defendant [3] took charge of the delivery of said mails and in addition to carrying the regular amount of mail imposed by the weight limit of the said mail contract with the United States Government, the said defendant, using the carriers, teams, equipment and credit of the said copartnership, carried excess mail amounting to several thousand dollars, all of which the said defendant refuses to account for to the plaintiff; that on or about the month of June, 1913, the defendant violating the terms of his said written agreement, endorsed one of the warrants issued by

the United States Government in payment of said mail services, in the sum of three thousand four hundred and six dollars and eleven cents (\$3,406.11), and instead of depositing the same with the Pacific Cold Storage above mentioned, cashed the same at the Miners and Merchants' Bank, at Nome, Alaska, and from the proceeds thereof took the sum of eighteen hundred dollars (\$1800.00); that since said time and on or about the month of May, 1914, the said defendant again drew from the said Pacific Cold Storage Company the sum of six hundred dollars (\$600.00), contending and claiming that said amount was due him at the rate of twelve dollars and fifty cents (\$12.50) per trip, contrary to the terms of said written agreement.

V.

That at the present time all of the terms of the said mail contract have been carried out and the said mail contract fully completed between the said copartnership and the United States Government, save and except the balance payment thereof; that there is now due the said copartnership from the United States Government for services rendered during the past year, the sum of nine thousand five hundred fifty-one dollars and fifty-five cents (\$9,551.55), besides a large amount of money [4] for carrying excess mail during the past year, all of which money will be paid by the United States Government to the said copartnership during the present summer in checks and warrants payable to the order of the defendant; that the said copartnership is indebted to the Pacific Cold Storage Company in about

the sum of eight thousand five hundred dollars (\$8,500.00) for money advanced to the said copartnership during the past year in defraying expenses of carrying out said contract; that the said defendant has boasted and bragged that he has taken twenty-four hundred dollars (\$2400.00) during the past year in excess of what is due him under the terms and covenants of his said agreement of copartnership and threatens to appropriate to his own use all warrants received from the United States Government for excess mail carried during the last four years; that the said defendant has violated the terms and conditions of his said copartnership agreement further by padding his expense account contrary to the terms of the said written agreement; that the said defendant is wholly and utterly insolvent and unable to respond in payment of any judgment that the plaintiff may obtain against him in this action; that unless the Court restrain the said defendant from cashing any and all of the warrants issued and delivered by the United States Government in payment of services rendered under and for said mail service, the plaintiff will be irreparably damaged and injured; that the defendant refuses to make any accounting or render any accounting to the plaintiff for the excess mail carried, or for the money appropriated and taken by him as above alleged, but, on the contrary, the said defendant has stated that the plaintiff could sue and obtain a judgment against him if the plaintiff knew any way to collect the same. [5]

VI.

That the plaintiff has at all times performed each

and every covenant and condition in said copartnership agreement on his part to be performed.

Wherefore, plaintiff prays for an order and decree of the Court as follows:

First. That the Court enter a temporary restraining order, restraining and enjoining the said defendant from secreting or cashing any of the warrants hereafter received by him from the United States Government in payment of any mail services rendered between Unalakleet and Nome, Alaska, until the final hearing and determination of this action, and that the Court further order and direct the said defendant to deliver all of said warrants to the said Pacific Cold Storage Company, treasurer of said copartnership.

Second. That the Court compel the defendant to account to the plaintiff for all money and warrants received for said mail services during the term of said copartnership agreement, and that the Court render an accounting between plaintiff and defendant of all things embraced within the scope of said copartnership, and by its decree dissolve said copartnership.

Third. That upon the final hearing and accounting in this case, the Court render its decree and judgment in favor of the plaintiff and against the defendant for the amount due from said defendant to the plaintiff.

Fourth. That the plaintiff do have and recover from the defendant his costs and disbursements in this action, and for such other and further relief as

shall seem to the court meet and proper.

WILLIAM A. GILMORE,

Attorney for Plaintiff. [6]

United States of America,

District of Alaska,—ss.

William A. Gilmore, being first duly sworn, on his oath, deposes and says:

That he is the attorney for the plaintiff in the above-entitled action; that as such attorney for plaintiff he prepared the above and foregoing complaint and knows the contents thereof and believes the same to be true; that affiant makes this affidavit for and on behalf of the plaintiff for the reason that the said plaintiff is now absent from the District of Alaska.

WILLIAM A. GILMORE.

Subscribed and sworn to before me this 3d day of July, A. D. 1914.

[Notarial Seal]

JAS. M. STREETEN,

Notary Public in and for the District of Alaska.

My commission expires 1st September, 1914.

Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome, Jul. 3, 1914.
G. A. Adams, Clerk.

And on the same day an affidavit was filed by plaintiff in words and figures as follows:

Affidavit [of William A. Gilmore, Filed July 3, 1914].

(Title Court and Cause.)

United States of America,

District of Alaska,—ss.

William A. Gilmore, being first duly sworn, on oath deposes and says:

That he is the attorney and agent of plaintiff in the above-entitled action, residing at Nome, Alaska; that affiant drew and prepared the agreement of co-partnership mentioned and set forth in plaintiff's complaint between the plaintiff and defendant on or about the 25th day of August, 1909, and at said time was very familiar from consultations between the plaintiff [7] and defendant, with their business transactions in that regard; that on or about the 15th day of June, 1914, affiant, at the request of plaintiff, consulted with the said defendant in an attempt to reach an accounting and settlement between plaintiff and defendant in accordance with the terms and covenants of their said agreement; that affiant and said defendant, Hegness, went to the office of the Pacific Cold Storage Company, in Nome, Alaska, and at said time affiant attempted to get the said defendant to render an accounting to the plaintiff; that said defendant stated to affiant in the presence of Miss Forni, the bookkeeper of the Pacific Cold Storage Company, that the plaintiff Chilberg had nothing to do with the excess mail that was carried over the said mail route, and that whatever warrants were coming in payment of said services belonged to him, Hegness, and that he was going to keep the same; that the said Hegness also stated that he had taken twenty-four hundred dollars (\$2400.00) from the said business, charging twelve dollars and fifty cents (\$12.50) per trip for each and every trip made; that he had collected eighteen hundred dollars (\$1800.00) for it in one lump sum by cashing a warrant at the Miners & Merchants' Bank, in the summer of 1913,

and the balance of six hundred dollars (\$600.00) he had obtained from the Pacific Cold Storage Company quite recently; that the said Hegness then stated that Chilberg could sue him and get judgment if he wanted to, if he, Chilberg, knew of any way of collecting the same; that he had taken the \$2400 and was going to keep it; that owing to the large amount of expenses due the Pacific Cold Storage Company for money advanced to the said copartnership, there will be but little profit, if any, remaining from the warrants still due from the United States Government; that owing to the threats, acts and actions [8] of the said defendant and also owing to the insolvency of the defendant, the plaintiff has no other legal or proper remedy other than by restraining the said defendant from in any manner or way secreting, cashing, assigning or disposing of any or all of the warrants now due from the United States Government for carrying the mail and excess mail between Unalakleet and Nome, Alaska; that affiant has no interest in this action other than that of attorney and agent for the plaintiff.

WILLIAM A. GILMORE.

Subscribed and sworn to before me this 3d day of July, A. D. 1914.

[Notarial Seal]

L. W. HAYDEN,

Notary Public in and for the District of Alaska.

My commission expires Oct. 14, 1917.

Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome, Alaska. Jul. 3, 1914. G. A. Adams, Clerk.

On consideration of said complaint and affidavit,

and upon giving an approved undertaking, the Court made and entered its order to show cause and restraining order as follows:

Order to Show Cause and Restraining Order.

(Title Court and Cause.)

To John Hegness, Defendant Above Named:

You are hereby directed and ordered, in conformity with the motion of the plaintiff heretofore made and filed in the above-entitled action, to show cause, if any you have, before this court, at the courtroom, at Nome, Alaska, on Saturday the 11th day of July, 1914, at 10 o'clock A. M., why you, your attorneys or agents, should not be enjoined and restrained from in any manner secreting, cashing, assigning or disposing of any warrants received by you through the United States mails, or otherwise, from the United States Government, in payment of any [9] mail service or services rendered by you as carrier or otherwise, between Unalakleet, Alaska, and Nome, Alaska, pending the final determination of this suit;

And you, your attorneys and agents, are hereby enjoined and restrained from in the meantime secreting, cashing, assigning or disposing of any of said warrants other than to the Pacific Cold Storage Company, a corporation, at Nome, Alaska, until you can be heard in open court or until the further order of the court in the premises.

Done in open court at Nome, Alaska, this 3d day of July, A. D. 1914.

J. R. TUCKER,
District Judge.

United States of America,
District of Alaska,
Second Division,—ss.

I hereby certify that I received the annexed order to show cause and restraining order on the 3d day of July, 1914, and thereafter on the same date I served the same at Nome River, Alaska, upon John Hegness, by delivering and leaving with him a copy thereof.

Returned this 6th day of July, 1914.

E. R. JORDAN,
United States Marshal.

Marshal's costs: 1 service, 6.00.

Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome, Jul. 3, 1914, G. A. Adams, Clerk. By J. A. B., Deputy.

On July 16th, 1914, defendant served and filed his demurrer in words and figures as follows: [10]

Demurrer.

(Title Court and Cause.)

Comes now the defendant above named and demurs to the complaint herein for the reason and on the grounds that it appears on the face of said complaint that said complaint does not state facts sufficient to constitute a cause of action.

G. J. LOMEN,
Attorney for Defendant.

Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome, Jul. 16, 1914. G. A. Adams, Clerk. By J. A. B., Deputy.

On July 17th, 1914, said order to show cause having been duly served and regularly continued until said day, came on to be heard. The plaintiff, in support of the application for an injunction *pendente lite*, introduced and read in evidence the said complaint and affidavit hereinbefore set forth, and defendant served, filed and read in evidence a certain affidavit in words and figures as follows:

Affidavit [of John Hegness, Filed July 16, 1914].

(Title Court and Cause.)

United States of America,

Territory of Alaska,

Second Division,—ss.

John Hegness, being duly sworn, on oath deposes and says: That he is the defendant above named. That he has read the complaint of the plaintiff herein and the affidavit of William A. Gilmore filed herein.

That he has stated his case to G. J. Lomen, his attorney, and that he is advised by his said attorney that he has a good defense to said action on the merits, but that said attorney has also advised this affiant that the complaint served and filed herein does not state a cause of action against this [11] defendant. That the contract set out in said complaint is void on its face, for the reason that it is in violation of the statutes of the United States and as against public policy, and that the subject matter of said contract is not one that could form the basis of any partnership, and that if the plaintiff has any cause of action against the defendant based on said contract, he, the said plaintiff, has an adequate rem-

edy at law in an action for breach of contract and damages and is a mere contract creditor.

The plaintiff, at the time said pretended contract was made, was a resident of Nome in said district, and that it was then and there contemplated that said plaintiff should furnish all needed capital in the matter of the transportation of the mails of the United States under contract, if such contract should be awarded to the defendant for carrying such mail and that plaintiff should, at all times, superintend and provide for the faithful performance of the contract for carrying said mails, it being intended that the said defendant should assume the duties of carrier rather than that of contractor. That said plaintiff, notwithstanding his agreements aforesaid, departed from the District of Alaska, in the fall of 1909, and has not since returned to said district, and has failed and neglected to furnish the requisite capital, and has failed and neglected to superintend said contract awarded to said defendant for carrying said mail. That by reason of the premises a great deal of extra work was thrown upon the defendant in looking after carriers and other matters connected with said business of carrying said mails, and that said extra services were reasonably worth the sum of six hundred dollars per year or at the rate of twelve dollars and fifty cents (\$12.50) per trip in carrying [12] the mail.

That defendant has at all times accounted to the plaintiff for all monies due to him under said contract. That at the time of making said contract set forth in the complaint, it was expressly understood

and agreed that the bid for carrying mail should embrace only the mail limited to 500 pounds per trip, and that no bid would be made in which plaintiff and defendant were interested for carrying any excess mail. That under no circumstances whatsoever did the plaintiff become interested in any contract for the carrying of any excess mail, and that up to date no money has been paid by the Government of the United States for the carrying of any excess mail, but affiant states that during the winter of 1913-14 contracts were awarded to him for the carrying of excess mail and that the profits, if any, for said work is wholly due the defendant.

JOHN HEGNESS.

Subscribed and sworn to before me this 10th day of July, 1914.

[Notarial Seal]

G. J. LOMEN,

Notary Public in and for the Territory of Alaska,
Residing at Nome, Alaska.

(My commission expires June 27, 1917.)

Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome, Alaska, Jul. 16, 1914. G. A. Adams, Clerk. By J. A. B., Deputy.

Defendant's demurrer to plaintiff's complaint was also argued and submitted at the same time, and on said July 17, said order to show cause and said demurrer were submitted to the Court. The evidence introduced by both parties on said order to show cause is all hereinbefore set forth.

On September 12th, 1914, the Court rendered an opinion overruling said demurrer and directing that

an injunction *pendente lite* should issue, and counsel were directed to prepare and present draft of such an order to be signed and [13] entered.

On September 15th, 1914, defendant served and filed herein his answer in words and figures as follows:

Answer.

(Title of Court and Cause.)

Now comes the defendant above named and for answer to the complaint herein denies and alleges as follows:

I.

Except as hereinafter admitted, qualified or otherwise alleged, he denies each and every allegation, matter and thing in said complaint contained.

II.

He admits that the plaintiff and defendant on the 25th day of August, 1909, made, executed and delivered the paper writing set forth in paragraph one of said complaint, but denies that said paper writing constituted or is a valid contract or agreement between the parties therein mentioned for the reason that said pretended agreement is contrary to law, contrary to statute and against public policy in this, that said paper writing purports to assign and, if held to be valid in other respects, in effect assigns the claims against the United States, mentioned in the complaint, to another, to wit, the alleged partnership mentioned in the complaint, and also in effect transfers a mail contract between defendant and the United States without the consent of the Postmaster General of the United States, and said con-

tract is void as against public policy in that it contemplates and provides that the defendant should make application in his own name and bid for the mail contracts in said paper writing mentioned without disclosing the interest of said plaintiff [14] in such contract, contrary to the rules and regulations of the postoffice department, and said pretended agreement contemplated and impliedly provided that the defendant should, in his said proposal or bid for mail contracts, falsely represent that such proposal or bid was made in his own interest and not as the agent or representative of any other person or company; and defendant further alleges that pursuant to such contemplation and implication in said pretended agreement contained and with the advice, knowledge and consent of said plaintiff, and for the purpose of securing to himself in his own name the mail contracts mentioned in the complaint and paper writing aforesaid, to wit, mail route No. 78,136, the defendant did, in his own name, make the representations aforesaid and did apply for said mail contract No. 78,136, and by reason thereof obtained from the Government of the United States the said mail contract, being a contract to carry the United States mail for the period of four (4) years between Unalakleet, Alaska and Nome, Alaska, for the agreed sum of sixteen thousand (\$16,000) dollars per year; that said mail contract was fully performed by defendant and terminated before the commencement of this action except as to certain payments due thereon from the Government of the United States.

III.

The defendant further alleges that before and at the time of making said alleged contract between plaintiff and defendant, the said plaintiff and one H. S. Chester were negotiating together and contemplated and intended to bid for said mail contract so let to the defendant as aforesaid; that said H. S. Chester then and there resided at Golovin, Alaska, and was a person duly qualified and able to bid for and carry out any contract to carry United States mail between said [15] Unalakleek, Alaska, and Nome, Alaska; that during said negotiations the said plaintiff pretended and represented to said Chester that he was in favor of bidding for such contract to carry the mails aforesaid under contract with said plaintiff or said Chester, or both, then and there knowing that defendant would also be a bidder for such contract; that defendant had no knowledge of said negotiations of plaintiff and said Chester at the time of making said pretended agreement with plaintiff; that plaintiff at all times before entering into said agreement, to wit, said paper writing set forth in the complaint, enjoined the defendant and demanded of him absolute secrecy in regard to their negotiations and failed and neglected to inform the said Chester of the negotiations pending between himself and defendant, intending then and there to cause said Chester to neglect bidding for said mail contract and for the purpose of stifling the bids for said contract and preventing competition in the bidding therefor; that by reason of the premises the said H. S. Chester and said plaintiff, so defendant

is informed and believes, did, in fact, neglect to bid for said mail contract or contracts and the bidding for said contract was thereby, in fact, stifled and the Government of the United States was thereby, in fact, deprived of competition in the bidding for said contracts to carry mail and prevented from knowing that a stranger to the contract, to wit, said plaintiff, was also interested in said mail contract awarded to the defendant.

IV.

The defendant specifically denies that the plaintiff and defendant, whether in the name of defendant, or otherwise, or in accordance with the terms of said pretended agreement between plaintiff and defendant, or otherwise, obtained any mail contract from the United States, or any other person or persons.

V.

Defendant specifically denies that in and by any [16] written or other contract or agreement between plaintiff and defendant it was contemplated, understood or agreed that the pretended partnership mentioned in said complaint should embrace or include all United States mail secured or handled over the said route between the points above mentioned or any mail except the mail mentioned in said contract secured by said defendant aforesaid, and defendant alleges that any contract made between plaintiff and defendant did not include excess mail, or mail not included in said mail contract between the defendant and the United States; and the defendant further alleges that all excess mail was

carried by defendant under separate, independent, individual and personal contracts secured by him from the Government of the United States, and was carried by him at his sole cost and personal expense and at an aggregate profit of not exceeding \$300.00; that the total sum paid or to be paid for carrying such excess mail was the sum of \$1895.20.

VI.

Defendant further denies that any mail contract was secured for the plaintiff and defendant whether under the terms of any copartnership agreement or otherwise, and denies that any mail contract was secured through the efforts of plaintiff, but defendant admits that plaintiff advanced and paid the costs of the bonds required of the defendant by the Government of the United States, to wit, the sum of twelve hundred (\$1200.00) dollars and no more, but defendant alleges that before the commencement of this action he repaid to the plaintiff the said sum of \$1200.00; defendant also admits that plaintiff loaned him the sum of \$250.00, which sum was also fully repaid to the plaintiff by defendant before the commencement of this action.

VII.

Defendant admits that plaintiff secured for the defendant [17] a line of credit with the Pacific Cold Storage Company, a corporation, and that said company from time to time advanced to defendant certain sums of money which were used by defendant in carrying out his said mail contract with the Government of the United States, but that all such sums so advanced by said company were repaid to

said company before the commencement of this action except the sum of \$2,795.37, and that since the commencement of this action the defendant has paid said Pacific Cold Storage Company the further sum of \$——; that there is now due from said defendant to said Pacific Cold Storage Company the sum of \$2,795.37 and \$422.19 interest, and no more; that said plaintiff is a mere surety for the payment of said balance to said company.

VIII.

Defendant denies that plaintiff and defendant, as partners or otherwise, complied with any contract with the Government of the United States, or were enabled by reason of any act or thing done by plaintiff to comply with any contract with the United States, but that all mail contracts mentioned in the complaint were fully complied with by the defendant and his employees and not in whole or in part by plaintiff.

IX.

Defendant further denies that plaintiff and defendant, mutually or otherwise, agreed with the Pacific Cold Storage Company mentioned in the complaint should act as their agent or as their treasurer or auditor, or that there was any contract, agreement or understanding that said Pacific Cold Storage Company should pay any bills for and on behalf of said plaintiff and defendant, or either of them, except as the same was expressed in the paper writing set forth in the complaint, and defendant admits and alleges that for the purposes therein expressed the said Pacific Cold Storage Company was ap-

pointed by said plaintiff as his representative or agent. [18]

X.

Defendant denies that any carriers, teams, equipment or credit was owned, had or secured by plaintiff and defendant or by the alleged partnership between them, but defendant alleges that the same were, except as hereinafter mentioned, owned, had and secured by defendant or his employees, and that plaintiff in no wise contributed to the carrying of any excess mail or had any interest therein.

XI.

Defendant admits that he has not accounted and will not account to said plaintiff for any of the monies received for or on account of carrying any excess mail.

XII.

Defendant admits that in the month of June, 1913, he endorsed a warrant received under his said four year mail contract, in the sum of \$3,406.11, and cashed the same and retained of said sum the sum of eighteen hundred (\$1800.00) dollars; and that in the month of May, 1914, the defendant endorsed and cashed a like warrant and retained of the sum so cashed the sum of six hundred (\$600) dollars; that all sums so cashed over and above the sum of twenty-four hundred (\$2400.00) dollars, was turned over to the Pacific Cold Storage Company; that all sums so retained by defendant from the proceeds of said warrants were monies belonging to the defendant, and if belonging to any pretended partnership that the same were retained by him as one of such partners

and for the purpose of reimbursing and paying him for extra services rendered said pretended partnership; that said extra services devolved upon defendant and were made necessary by the fact that said plaintiff who, at the time of entering into said written agreement, was a resident of Nome, Alaska, and who, under the terms of said written agreement and the understanding had between said parties, was [19] to superintend and look after the performance and execution of defendant's mail contract in defendant's absence from time to time as a mail carrier, left the District of Alaska in the fall of 1909 and has since resided out of said district and has, since his departure from Alaska, taken no active part in the performance of any mail contract held by defendant and above mentioned, and defendant did perform all of said services which would have been performed by said plaintiff had he not departed from said district; that the reasonable value of the services so performed were \$12.50 per round trip made by said defendant as mail carrier or six hundred (\$600.00) per annum.

XIII.

Defendant alleges that plaintiff did not advance the necessary money to begin or to operate said four year mail contract or said mail route until payments were made by the Government of the United States, or at all, and the defendant was compelled to pay and expend, and did pay and expend on said mail route the sum of one thousand (\$1,000.00) dollars, no part of which has been repaid to him except the sum of three hundred dollars ap-

propriated and paid to defendant by the Alaska Road Commission.

XIV.

Defendant alleges that the amount due from the Government of the United States on his mail contracts at the time of the commencement of this action was the sum of \$6,186.17 and that \$1,895.20 thereof was for carrying excess mail; that all the monies due from the Government of the United States under said mail contracts were, at the commencement of this action, and are now due to the defendant individually and personally and to no other person or persons, and defendant admits that all warrants drawn for the payment of such monies will be drawn and [20] made payable to the order of this defendant and not otherwise.

XV.

Defendant denies that said pretended copartnership were, or was indebted to the Pacific Cold Storage Company in any sum whatsoever, but defendant admits that he is indebted to said company on account of monies advanced by said company to him and used by him in carrying out his said four year mail contract in the sum of \$2,795.37 and \$422.19 interest, and no more.

XVI.

Defendant denies that he has at any time boasted or bragged that he has taken any monies belonging to said pretended or alleged partnership, and he alleges that all monies retained by him and mentioned in the complaint are his personal property and was justly earned by him.

XVII.

Defendant denies that he has ever padded any expense account, or that he has violated any of his contracts or agreements with plaintiff.

XVIII.

Defendant denies that he is insolvent and alleges that he is abundantly able and willing to pay all his just debts and liabilities, or any judgment that may be recovered against him.

XIX.

Defendant denies that unless he be restrained from cashing warrants received by him from the United States, plaintiff will be irreparably injured or damaged or otherwise injured or damaged, and defendant alleges that the plaintiff has a full, complete and adequate remedy at law for any and all damages, if any, suffered by him by reason of any of the acts complained of herein.

For a further, separate and affirmative defense the defendant alleges: [21]

I.

That at the time of the commencement of this action the alleged copartnership existing between plaintiff and defendant had no assets of any kind or nature whatsoever, and that the defendant did not have in his possession any assets whether warrants, drafts, monies or otherwise belonging to said alleged partnership, and that to recover any monies due from the Government of the United States, or to seek an accounting with reference to same or to impress a lien upon same, this action was, and is, for the reasons stated, premature.

And for a further and separate defense the defendant alleges by way of counterclaim that if said alleged partnership shall be found to be a legal and existing partnership, that the defendant, at the expense and request of plaintiff and said partnership, performed work, labor and services for and on account of said alleged partnership in the superintendence and performance of the mail contract mentioned in the complaint, to wit, the four year mail contract therein mentioned, and that said services were of the reasonable value of thirty-four hundred (\$3400.00) dollars, no part of which has been paid except the sum of twenty-four hundred (\$2400.00) dollars, which has been repaid by said alleged partnership, and three hundred dollars received from the Alaska Road Commission.

WHEREFORE defendant prays that said action be hence dismissed, that he have judgment against the plaintiff for the sum of seven hundred (\$700.00) dollars and for his costs and disbursements herein.

G. J. LOMEN,

Attorney for Defendant.

United States of America,
Territory of Alaska,—ss.

John Hegness, being first duly sworn, on oath deposes and says: That he is the defendant named in the foregoing action; that he has read the foregoing answer, knows the contents thereof and the same is true, as he verily believes. [22]

JOHN HEGNESS.

Subscribed and sworn to before me this 15th day of September, 1914.

[Notarial Seal]

G. J. LOMEN,

Notary Public for the Territory of Alaska.

(My commission expires June 27th, 1917.)

Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome, Sept. 15, 1914.
G. A. Adams, Clerk.

On September 15th, 1914, plaintiff served and filed herein an affidavit and motion for the appointment of a receiver in words and figures as follows:

Motion [for Order Appointing Receiver, etc.].

(Title of Court and Cause.)

Comes now the plaintiff in the above-entitled action, by and through his attorney, and moves the Court for an order appointing a receiver to receive the property belonging to the copartnership of the plaintiff and defendant described in plaintiff's complaint; and for the further order of the Court directing the defendant to deliver to said receiver all United States warrants now in his possession or hereafter to be delivered to him growing out of or pertaining to the things described and set forth in plaintiff's complaint.

This motion is made and based upon the affidavit of William A. Gilmore, served and filed herewith, and upon all the pleadings, files and records in the above-entitled action.

Dated at Nome, Alaska, this 15th day of September, 1914.

WILLIAM A. GILMORE,
Attorney for Plaintiff.

Filed in the office of the clerk of the District Court of Alaska, Second Division, at Nome, Sept. 15, 1915.
G. A. Adams, Clerk.

Affidavit [of William A. Gilmore, Filed September 15, 1914].

(Title of Court and Cause.)

United States of America,
District of Alaska,—ss. [23]

William A. Gilmore, being first duly sworn, deposes and says:

That he is one of the attorneys for the plaintiff in the above-entitled action; that heretofore, on the 3d day of July, 1914, in the above-entitled action, the Court by its written order duly signed, served and filed, in the above-entitled action, enjoined and restrained the defendant from secreting, cashing, assigning or disposing of any of the warrants received by the defendant from the United States Government for carrying the mails under contract described in plaintiff's complaint, other than to the Pacific Cold Storage Company, which said company was acting as treasurer of the partnership described in the complaint;

That annexed hereto and made a part of this affidavit, and marked Exhibits "A" and "B," are statements from the postoffice department, Washington, D. C., bearing date July 30, 1914, showing that on the 29th day of July, 1914, the postoffice department made out and mailed to the defendant, John Hegness, postoffice warrant No. 363,766, amounting to \$3,903.-02; and on June 26th, 1914, postoffice warrant No. 335,288, amounting to \$1,395.20, and on July 28th,

1914, postoffice warrant No. 360,747, amounting to \$500.00, the total amount of all three of said warrants being \$5,798.22; that none of said warrants could have been received by the defendant in the regular course of mail, prior to the date of said restraining order; that affiant is informed and believes and the said John Hegness, defendant, has received all three of said warrants since, at Nome, Alaska, in the regular course of mail, and is now secreting the same contrary to the order of the Court heretofore entered, served and filed; that the said defendant has not turned over or delivered said warrants, or any of them, to the Pacific Cold Storage Company; that the said copartnership consisting of [24] the plaintiff and defendant, is indebted to the said Pacific Cold Storage Company in the sum of several thousand dollars, advanced by said Company as the treasurer of said copartnership.

That the said warrants above referred to are the partnership property of the plaintiff and defendant, under the agreement set forth in the plaintiff's complaint, and the defendant is threatening soon to leave the District of Alaska and take said warrants with him unless restrained by the Court or compelled by order of the Court to deliver said warrants to the said Pacific Cold Storage Company or to a receiver appointed by the Court; that unless said warrants are delivered to the said Pacific Cold Storage Company, or to a receiver subject to the final order of the Court, the plaintiff will be irreparably damaged and the orders and decree of this Court rendered null and

void and of no effect, said defendant being wholly insolvent.

WILLIAM A. GILMORE.

Subscribed and sworn to before me this 15th day of September, A. D. 1914.

[Notarial Seal]

L. W. HAYDEN,

Notary Public in and for the District of Alaska.

My commission expires October 14, 1917.

Exhibit "A."

POSTOFFICE DEPARTMENT.

Second Assistant Postmaster General.

Washington, July 30, '14.

Statement of payments made for services performed to John Hegness, Contractor, Nome, Alaska, Route Number 78136, Nome, to Unalakleet, Alaska.

Season of Service November 1st to May 31st each year. [25]

No. of. Warrant.	Month.	No. of Trips.	Warrants Mailed.	Amount.
	1913:			
207220	Nov.			
	Dec.	9	Feb. 19, 1914	\$1527 26
229892	Dec.	7	Mch. 12, 1914	1187 87
254733	Dec.	3	Apr. 2, 1914	509 09
	1914:			
254734	Jan.	9	Apr. 2, 1914	1527 27
257038	Jan.	4	Apr. 9, 1914	678 78
303189	Jan.			
	Feb.			
	Mch.	22	May 25, 1914	3733 32
322111	Feb.			
	Mch.	15	June 13, 1914	2545 44
363766	Mch.			
	Apr.			
	May	23	July 29, 1914	3903 02
			Total,	<hr/> \$15612 05

There are two trips performed in May, 1914, for which complete evidence has not been received, to be paid for, the amount of which payment will be \$387.-95, which will be the balance due the contractor for the season.

Exhibit "B."

POSTOFFICE DEPARTMENT.

Second Assistant Postmaster General.

WASHINGTON, July 30, 1914.

Statement of payments made for services performed to John Hegness, Contractor, Nome, Alaska, for carrying excess mail from Unalakleet, to Nome, Alaska.

No. of Warrant.	Left Unalakleet.	Weight Lbs.	Rate per Pound.	Warrant Mailed.	Amount.
335288	12-23-13	488	40c		
	1- 8-14	1000	40c		
	2- 2-14	500	40c		
	3- 5-14	1500	40c		
	Total	3488		June 26, 1914	\$1395 20
360747	4-15-14	1250	40c	July 28, 1914	500 00
				Total,	\$1895 20

Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome, Sep. 15, 1914.
G. A. Adams, Clerk. [26]

On September 15th, 1914, the defendant served and filed herein his motion to vacate restraining order and his affidavit in support thereof, which said motion and affidavit were in words and figures as follows:

Motion [to Vacate Restraining Order, etc.].

(Title of Court and Cause.)

Now comes the defendant above named and by leave of the Court first had and obtained, moves the Court to vacate the restraining order heretofore made and entered herein and the temporary injunctional order made, entered and filed herein on the 12th day of September, 1914. That if said motion to vacate said orders be not granted, then that the Court modify said temporary injunction so far as the same covers or affects any warrants or monies received by the defendant for carrying any excess mail and amounting to the sum of \$1895.20.

This motion is based upon the reasons and grounds stated in the affidavit of John Hegness hereto attached and upon the records and files herein, and especially the answer of said defendant herein.

G. J. LOMEN and

IRA D. ORTON,

Attys. for Deft.

Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome, Sept. 15, 1914.
G. A. Adams, Clerk.

**Affidavit [of John Hegness, Filed September 15,
1914.]**

(Title Court and Cause.)

United States of America,
Territory of Alaska,—ss.

John Hegness, being first duly sworn, on oath deposes and says:

That he is the defendant in the above-entitled action. That at the time the contract set forth in plaintiff's complaint was signed, on or about the 25th day of August, 1909, by plaintiff and defendant, it was entered into for the purpose of obtaining, as stated therein, a mail contract for carrying the [27] United States mail between Nome, Alaska, and Unalakleet; that circulars had already been issued by the Postoffice Department at that time in which two proposed routes were described upon which bids were solicited, viz., Route No. 78136, limited to five hundred pounds each trip, and Route No. 78137, taking all mail offered; that the bids made by defendant on Route No. 78136 were accepted and no contract whatever was made by the department upon Route No. 78137, but *was* route was discontinued.

Affiant further says that in the month of December, and on or about the 13th day of December, 1913, an order was made by the Second Assistant Postmaster General authorizing the Chief Clerk of the railway mail service at Nome to employ a carrier to carry 1500 pounds of additional mail from Unalakleet to Nome *via* Golovin, Bluff, and Solomon to be known as Route No. 78297. That under said authorization the acting Chief Clerk of the railway mail service at Nome did employ this affiant to carry said additional mail from Unalakleet to Nome *via* Golovin, Bluff and Solomon; that afterwards on divers dates between December, 1913, and May, 1914, the said Second Assistant Postmaster General authorized the said Chief Clerk of the Railway Mail

Service at Nome to employ an additional carrier to carry excess mail from Unalakleet to Nome, Alaska, *via* Golovin, Bluff and Solomon to the extent of 4500 pounds in accordance with said route to be known as No. 78297 as above stated; that in accordance with said authorization the said Chief Clerk of the said Railway Mail Service did, at divers times, employ this affiant to carry said additional mail known as Route No. 78297 and the compensation earned by affiant therefor amounted to the total sum of \$1895.20 and is represented by warrants No. 335,288 and No. 360,748.

Affiant further says that at the time said agreement dated the 25th day of August, 1909, was entered into between plaintiff and defendant it was only contemplated that the defendant [28] should bid on routes No. 78136 and No. 78137; that said route No. 78297 had at that time not been established nor was the establishment of the same thought of or contemplated by the plaintiff or defendant or the officials of the postoffice department; nor was it contemplated by said agreement of the 25th of August, 1909, that the defendant should bid on any excess contract whatever.

Affiant further says that the expenses of carrying said excess mail were paid by affiant out of his own pocket and with his own private funds; that affiant paid the sum of 22½ cents per pound to the carriers for carrying said mail from Unalakleet to Golovin and additional sums, the exact amount of which he cannot state, for carrying said mail from Golovin to Nome.

Affiant further states that he did not use the carrier's teams, equipment or credit of the alleged partnership mentioned in the complaint to carry said excess mail, nor was the carrying of said excess mail any additional expense or any expense at all to said alleged partnership over and above the regular amount which said alleged partnership paid for carrying the regular mail under contract No. 78136; that the alleged partnership mentioned in plaintiff's complaint and claimed to have been created by said agreement of the 25th of August, 1909, never, at any time, owned any teams, or equipment for the purpose of carrying mail, and never, at any time, owned any property whatever save and except any interest which it might have in monies derived from said route No. 78136; that all the equipment and property of every kind used in carrying the mail under said contract No. 78136 was either the private individual property of the defendant or belonged to the carriers who carried the mail under said route No. 78136 for a stated sum per trip; that the only excess or additional mail carried by affiant during the term of said contract No. 78136 was carried [29] between the months of December, 1913, and May, 1914; that during prior years while said contract was in force, large quantities of additional mail were carried from Unalakleet to Nome, while affiant was engaged in the performance of his said contract No. 78136, by other contractors, showing conclusively that said additional and excess mail was in no manner contemplated or included or connected with said contract No. 78136.

Affiant further states that under the alleged partnership agreement of August 25th, 1909, plaintiff promised and agreed to furnish the necessary bond required by the Government for carrying mails under the bid or bids mentioned in said agreement; that after the contract for mail route No. 78136 was let and monies turned over to the Pacific Cold Storage Company by the defendant and thereafter transmitted to said plaintiff, the said plaintiff, without any right or authority so to do, appropriated to himself the alleged cost of the bond furnished, to wit, the sum of \$1200.00; that said plaintiff never furnished the defendant with any statement showing the disposition of funds received by him during the said first year of said mail contract; that it was contemplated and agreed in and by said agreement between said plaintiff and defendant that all monies necessary to begin and operate the said mail route No. 78136 should be advanced by plaintiff without any cost or interest charged therefor; that plaintiff did not advance any monies but caused the Pacific Cold Storage Company to advance various sums of money from time to time; that said Pacific Cold Storage Company for said advances, charges for all of said advances the sum of 8% per annum upon all the monies advanced which interest account, during said contract, amounted to the sum of about \$1600.00 and was retained from time to time by said Pacific Cold Storage Company, except the sum of \$422.19 now claimed [30] to be due for interest upon advances made by said company, and if said contract between said plaintiff and defendant should be held

to be good and valid, then said plaintiff should account to said defendant for said \$1200.00, the alleged cost of said bond, and for all interest monies appropriated by said Pacific Cold Storage Company on account of interest; that in addition to said \$1200.00 and said interest monies the defendant paid and advanced from his own pocket and from his own private funds, the sum of about \$1000.00 in improving and repairing the mail route for carrying said mails, no part of which has been repaid to said defendant except the sum of about \$300.00 paid by the Alaska Road Commission to defendant.

Affiant further states that since the restraining order was made and entered herein the defendant has not cashed any warrants, the proceeds of which have not been turned over to the Pacific Cold Storage Company as contemplated by the agreement set out in the complaint herein, and has not secreted any of the warrants or the proceeds thereof, but that the same are now in his possession and subject to the proper orders of this Court, except the warrants mentioned in the affidavit of William A. Gilmore filed herein on the 15th day of September, 1914, being warrant No. 322,111 for \$2545.44 and warrant No. 363,766 for the sum of \$3903.02, which have not yet been received through the mails, owing, as affiant is informed and believes, to the fact that certain mail was inadvertently left over in Seattle.

JOHN HEGNESS.

Subscribed and sworn to before me this 15th day of September, 1914.

[Notarial Seal]

G. J. LOMEN,

Notary Public in and for the Territory of Alaska,
Residing at Nome, Alaska.

(My commission expires June 27th, 1917.)

Filed in the office of the Clerk of the District Court of Alaska, [31] at Nome, Sep. 15, 1914. G. A. Adams, Clerk.

On said September 15th, 1914, the order granting the injunction *pendente lite* not having been as yet entered, the Court again took up and heard the following motions and applications at the same hearing and argument:

First: The Original Order to Show Cause.

Second: Defendant's motion to vacate, filed September 15th, 1914.

Third: Plaintiff's motion for a receiver; on said hearing all the papers hereinbefore set forth were introduced in evidence and plaintiff also served, filed and introduced in evidence a further affidavit in words and figures as follows:

Affidavit [of William A. Gilmore (Filed September 16, 1914, as of September 15, 1914)].

(Title of Court and Cause.)

United States of America,
District of Alaska,—ss.

William A. Gilmore, being first duly sworn, deposes and says:

That he has read the affidavit of the defendant, John Hegness, filed in support of his motion to vacate the temporary restraining order and also the answer

that defendant served and filed in this action, and replying to the same on behalf of the plaintiff, alleges that he has in his possession original correspondence between the plaintiff and defendant and the post-office officials of the United States, which clearly show that the postoffice authorities knew at all times that the plaintiff, Eugene Chilberg, was interested in the mail contracts with the defendant, John Hegness, between Unalakleet and Nome, Alaska; that the post-office department officials at Washington, D. C., have repeatedly furnished schedules and financial statements of said business to the plaintiff, Eugene Chilberg, during the past four years; that ever since said partnership began, in the year 1909, and up until the year 1913, the plaintiff [32] and defendant had annual settlements through the treasurer of said partnership, the Pacific Cold Storage Company, as shown by Exhibits attached hereto; that the first disagreement that arose between the plaintiff and defendant was when the defendant, contrary to his agreement, cashed one of the postal warrants and retained therefrom a large part of it to his own use during the season of 1913.

That attached hereto are three annual statements showing the cost and expense of conducting the said business, and the amount of profit and the division of the profit for the first three years of said business, as shown by the books of the Pacific Cold Storage Company and their annual statements made to the plaintiff; that also attached thereto is an annual statement made by the Pacific Cold Storage Company bearing date Aug. 1, 1914, and delivered by the

said Pacific Cold Storage Company to the plaintiff, Eugene Chilberg, after said date, showing the condition of the said partnership business on said date, said statement being marked Exhibit "D."

That for the winter of 1910 and '11, or the first year of said partnership business, the total expense of conducting said business was \$11,829.00; for the second year or the winter of 1911 and 1912, the total expense of conducting said business was \$12,573.56, as shown by said statement; for the third winter, or the winter of 1912 and 1913, Exhibit "C," the total expense of conducting said business was \$12,210.20, while the fourth winter, or last winter 1913 and 1914, the expense as shown by Exhibit "D," statement of Pacific Cold Storage Company, was \$14,504.10; this last winter being the only winter that excess mail was contracted for or carried by Hegness between Unalakleet and Nome.

That the plaintiff claims that the defendant took the money that was coming to the plaintiff in the settlement at the [33] end of 1913 and deposited the same in the bank at Nome, and appropriated the same, or nearly all thereof, to his own use, save and except the sum of \$1296.37 which the plaintiff received, as shown by a statement made by the plaintiff, annexed hereto marked Exhibit "F"; that annexed hereto marked Exhibit "E" is a copy of a letter in the possession of affiant written by the defendant to the plaintiff, bearing date Nov. 3d, 1913, which admits that the said defendant took the said money, and that he arbitrarily and without right drew from said business the sum of \$12.50 per mail trip, or \$2,400.00.

That plaintiff contends that he received at the end of the first year his amount of the profits mentioned in Exhibit "A," and at the end of the second year his amount of the profits mentioned in Exhibit "B"; that Hegness at the end of the third year, 1913, appropriated the profits of the business and refuses now to account for any profits for 1914, or last year.

That affiant is informed by the plaintiff and believes that all of the mail carried as excess mail during the last year of said partnership was carried by the said partnership and was paid for by the defendant out of the funds of said partnership furnished by said Pacific Cold Storage Company and charged up against the said partnership business, and is a part of the said 1914 expense for the past winter.

That the plaintiff is now in Los Angeles, California, and is unable to make an affidavit as to the facts, and affiant makes this affidavit on his behalf as to all statements and things within affiants possession.

That annexed hereto is a copy of a letter from the plaintiff to affiant, bearing date Aug. 12, 1914, marked Exhibit "G," showing the manner in which the plaintiff claims the defendant has misappropriated the partnership money.

WILLIAM A. GILMORE. [34]

Subscribed and sworn to before me this 16th day of September, 1914.

[Notarial Seal]

L. W. HAYDEN,

Notary Public in and for the District of Alaska.

My commission expires Oct. 14, 1917.

Exhibit "A."

STATEMENT.

Mail Contract—Nome—Unalakleet—Winter 1910-11—John Hegness.

RECEIPTS.

P. O. Warrants received and turned over to Pacific Cold Storage
 Company\$16000.00

DISBURSEMENTS:

Wages—

Hegness, J.....	\$3600 00
Johnson, E.	2250 00
" " (extra).....	54 00
Abrahamson, H.	2250 00
" " "	54 00
Curran, P.	1350 00
Erickson, L.	1275 00

\$10833 00

Sundries—

Hegness (extra team)	400 00
Bond (1910-1)	300 00
Telephoning	39 00
Extra drivers	81 00
Bookkeeping	150 00
Extras	26 00

996 00 \$11829 00

Net Profit, \$ 4171 00

DIVISION OF PROFITS:

John Hegness.....	15% of \$4171 00	625 65
Eugene Chilberg	85% of 4171 00	3545 35

Exhibit "B."

STATEMENT.

Mail Contract—Nome—Unalakleet—Winter 1911-12—John Hegness.

RECEIPTS.

P. O. Warrants received and turned over to Pacific Cold Storage
 Co.\$15830 30
 Oct. 16, 1912 Cash. paid by John Hegness to Pacific Cond Storage
 Co. 169 70
\$16000 00

DISBURSEMENTS:

Wages—

Hegness, J.....	\$3600 00	
Johnson, E.	1950 00	
Curran, P.	1800 00	
Erickson, L.	1350 00	
Hammer, J. R.	1275 00	
Seddon & Others.....	775 00	
Eagle Launch	175 00	\$10925 00

Sundries—

Hegness (extra team)	400 00	
Carriers (extra allowance).....	158 00	
Team hire	117 00	
Helpers	60 00	
Bookkeeping	200 00	
Xmas cigars & affidavit.....	19 00	
Telephoning	72 19	1026 69

Eagle Launch—

Purchase price	400 00
Repairs & expense.....	376 87
	<u>776 87</u>

Deduct for trips charged to wages

as noted above	175 00	601 87
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Hegness, John

Overdrawn on account.....	20 00	12573 56
---------------------------	-------	----------

 3426 44

DEDUCT:

Due to Eugene Chilberg, Bond for 1911-12.....	300 00
---	--------

 \$ 3126 44

DIVISION OF PROFITS:

John Hegness	15% of \$3126 44	468 97
Eugene Chilberg	85% of 3126 44	2657 47

Exhibit "C."**STATEMENT.**

Mail Contract—Nome—Unalakleet—Winter 1912-13—John Hegness.

RECEIPTS:

P. O. Warrants received and turned over to Pacific Cold Storage Co.	\$8993 89
June 23, 1913—Cash paid by John Hegness to Pacific Cold Storage Co.	1000 00
Aug. 29, 1913—Cash paid by John Hegness to Pacific Cold Storage Co.	2600 00
	<hr/>
	\$12593 89

[36]

DISBURSEMENTS:**Wages—**

Hegness, J.	\$3675 00	
Curran, P.	2250 00	
Johnson, E.	2250 00	
Erickson, L.	1350 00	
Dexter, Joe	1275 00	
Seddon, Steamer	225 00	\$11025 00
	<hr/>	

Sundries—

Hegness (extra team).....	400 00		
Wilhelmina & others.....	322 90		
Carriers (extra allowance).....	108 00		
Team hire	50 00		
Helpers	33 00		
Xmas cigars	27 00		
Telephoning	69 30		
Bookkeeping	150 00		
Meals, Bluff, Golovin, Solomon....	25 00	1185 20	12210 20
	<hr/>	<hr/>	<hr/>
			383 69

Difference between \$12593.89, the amount turned over to the Pacific Cold Storage Co. and \$16000, the total amount of warrants received from the P. O. Department by Hegness which amount Hegness appropriated to his own use..... 3406 11

3789 80**DEDUCT:**

Due Eugene Chilberg, Bond for 1912-3.....	300 00
	<hr/>
	3489 80

DIVISION OF PROFITS:

John Hegness, 15% of \$3489 80.....	523 47
Eugene Chilberg, 15% of \$3489 80.....	2966 33

Exhibit "D."

Nome, Alaska, Aug. 1, 1914.

John Hegness

In Account with PACIFIC COLD STORAGE COMPANY.

1913:

Nov.	14.	Cash advanced	ev	1848	378 00	1
	22.	" "	v	1850	287 50	2
	30.	" "		1857	265 00	3
Dec.	5.	" "		1873	265 00	4
	11.	" "		1874	275 00	5
	12.	Long Distance		1877	10 75	
	19.	Cash Advanced		1878	285 00	6
	27.	" "		1880	265 00	7
	31.	" "		1884	350 00	8-9
1914:		Long DI.		1889	9 70	
Jany.	4	Cash		1896	265 00	10
	8.	"		1897	265 00	11

[37]

	12.	Cash		1898	265 00	12
	16.	"		1901	265 00	13
	17.	"		1903	265 00	14
	22.	"		1904	265 00	15
	26.	"		1905	265 00	16
	29.	"		1906	265 00	17
	31.	"		1909	265 00	18
	"	Long D. Jany.		1921	8 40	
Feby.	4.	Cash		1923	265 00	19
	9.	"		1925	265 00	20
	11.	"		1926	265 00	21
	16.	"		1929	265 00	22
	20.	"		1930	265 00	23
	23.	"		1931	265 00	24
	25.	"		1932	265 00	25
	28.	"		1934	265 00	26
	"	Long D. Feby.		1944	5 50	
Mar.	4.	Cash		1952	265 00	27
	9.	"		1953	265 00	28
	12.	"		1954	265 00	29
	16.	"		1955	265 00	30
	20.	"		1957	265 00	31

	23.	Cash	1958	553 00	32-33
	27.	"	1959	265 00	34
	30.	" Advance v	1961	265 00	35
	31.	" "	1963	265 00	36
	"	Long Distance	1965	11 00	
Apr.	6.	Cash Advanced	1975	265 00	37
	9.	" "	1977	265 00	38
	13.	" "	1978	265 00	39
	15.	" "	1978	265 00	40
	20.	" "	1982	265 00	41
	23.	" "	1983	530 00	42-43
	30.	" "	1986	265 00	44
	"	Long D. Apr.	1991	5 90	
May	4.	Cash Advanced	2000	265 00	45
	11.	" "	2001	409 00	46
	16.	" "	2002	277 00	47
	25.	" "	2005	452 00	48
	30.	L. D. May	2010	5 35	
June	8.	Cash Advanced	2023	1196 00	
				<hr/>	
1914:				14504 10	
Apr.	20.	P. O. War. #207220 J. E.	176	1527 26	
	23.	" " " #229892 J. E.	176	1187 87	
June	2.	P. O. War. #254733 C	17	509 09	
	"	P. O. War. #254734 C	17	1527 27	
	"	P. O. War. #257038 C	17	678 78	
	15.	P. O. War. #303189 C	19	3733 32	
July	1.	P. O. War. #322111 C	21	2545 44.	
				<hr/>	
				11709 03.	

Exhibit "E."

Nome, November 3d, 1913.

Mr. Eugene Chilberg,

Los Angeles, Cal.

Dear Sir:

Just received your letter this evening and got to *live* against in the morning with the mail so it will be a short letter. The money you claim you want to have sent out I deposited in the bank so I would have something to start with this fall. Now [38]

one of my carriers quit so I had to pay out money for feed *til* I got somebody and you know I got nothing so how do you figure I am to get along. I have been borrowing money from the bank every year for these things paying big interest and traveling up and down the Coast in the summer tending to those things and did not even get thanks from you for it. You don't remember that I spent a whole summer fixing the trail before we started the contract and I borrowed \$600 besides the \$250 you let me have and got back from the government about \$400.00 and I sent back your money, so you can see who came out the loser.

It is true Mr. Chilberg that you got me into the service, but thats all I gotten so far. You have made the profits. You could at lease have come up here in the summer and look after things so I could have gone to work. I am now after a trip down the coast looking over the trail after the big storm and my carriers don't want to start unless they get bigger pay so you see what I am up against all the time. You don't know that the winters have not been like they used to be on the coast, no ice to speak of so we have had to travel over capes all winter and early breakups in the spring.

I have all ways taken the worst of it myself and nearly lost my life three times just to get the mail through on time. Now I was going to do all those things and quit broke and let it go, but now you are telegraphing to everybody just as if I was a big criminal thats a little more than I can stand. I want some pay for all my worry and time ever since

the contract started. I think about \$12.50 per trip ever since the contract started should be just about right.

You are wondering why I have made other arrangements but I am not going in with anybody for I am out of the race, and my wife and I will *live* Nome in the Spring without a dollar. I hope that you will get a partner that will do all these things for you and say nothing.

Best regards to you and family.

Yours truly,

JOHN.

Exhibit "F."

WINTER 1912-13:

Due Eugene Chilberg from Funds in Possession
John Hegness.

Bond for 1912-13 ($\frac{1}{4}$ of \$1200
total premium)..... 300 00

85% of \$3,489 80 net profit for

1912-13.....2966 33 \$3266 33

DEDUCT:

Sept. 4, 1913. Interest on account
to *Pacitif* Cold Storage Co. as-
sumed by Chilberg..... 316 16

Oct. 10, 1913. Cash received
from Pacific Cold Storage Co.
by Chilberg..... 67 53

Jan. 17, 1914. Cash Received

from Pacific Cold Storage Co.

by Chilberg..... 912 68 1296 37

Balance due Chilberg out of

\$3,405.11, which was appropri-

ated by Hegness.....

\$1969 96

[39]

Exhibit "G."

Los Angeles, Cal., Aug. 12th, 1914.

Mr. Wm. A. Gilmore

or

Mr. Geo. B. Grigsby,

Nome, Alaska.

Dear Sir:

Referring to my letter of August 11th to you relative to the \$3406.11 mentioned in Paragraph 4 of the complaint, would say that Mr. John Hegness appropriated this amount in the following manner:

On June 23d, 1913, Hegness cashed a warrant for \$1697.11 of which he appropriated to his own use \$697.11, and the balance he deposited with the Pacific Cold Storage Co., and on August 29th, 1913, he also cashed another warrant for \$5309.00, of which he appropriated to his own use \$2709.00, and the balance of \$2600.00 he deposited with the Pacific Cold Storage Company. The amounts of \$697.11 and \$2709.00 which he appropriated to his own use, total \$3406.11 which amount he retained out of the \$16000 he received from the Post Office Department for carrying the mail during the winter of 1913-14.

Another matter which must not be overlooked, is the premium due me on the \$20,000.00 bond furnished

for Hegness. This premium has been distributed through the four years of his contract at the rate of \$300.00 per year, and there is now due me \$600.00 for the past two years which has not been paid.

I trust this information will post you fully as to how Hegness failed to turn over all the warrants he received from the Post Office Department last year to the Pacific Cold Storage Co. which is in direct violation of his agreement with me.

Very truly yours,

EUGENE CHILBERG,

\$639 South Hill Street.

EC/JAG.

Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome, September 16, 1914, as of Sept. 15, 1914. G. A. Adams, Clerk.

On September 18th, 1914, the Court made and entered its order vacating in part, the original restraining order, which said order was in words and figures as follows: [40]

Order (Modifying Injunction and Restraining Order).

(Title Court and Cause.)

In the above-entitled action IT IS HEREBY ORDERED that the injunction and restraining order heretofore made and signed in the above-entitled action be, and the same is hereby dissolved in so far as said injunction and restraining order enjoins or restrains the defendant John Hegness from endorsing and cashing any and all warrants of the postoffice department issued to the said John Hegness for carrying excess mail from Unalakleet to Nome,

Alaska, and particularly the said injunction and restraining order dissolved as to warrants Nos. 335,288 and 360,747 for \$1395.20 and \$500.00 respectively.

Dated at Nome, Alaska, September 18th, 1914.

J. R. TUCKER,
District Judge.

[Endorsed]: Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Sep. 18, 1914. G. A. Adams, Clerk. By ———, Deputy.

On September 18th, 1914, the Court also made and entered its order granting an injunction *pendente lite*, which said order was in words and figures as follows, to wit: [41]

Injunction Pendente Lite.

(Title Court and Cause.)

This matter coming on for hearing before the Court this 18th day of September, 1914, the plaintiff being represented by his attorneys, Messrs. George B. Grigsby and William A. Gilmore, and the defendant being represented by his attorneys Messrs. G. J. Lomen and Ira D. Orton, and the Court having heretofore heard and considered all of the affidavits, evidence and testimony produced on the part of the plaintiff and the defendant and being fully advised in all the premises,

NOW, ORDERS and DIRECTS that pending the final determination and decree or other order of this Court, you, John Hegness, defendant, your attorneys and agents, be, and each of you are hereby enjoined and restrained from secreting, cashing, assigning or disposing of (except to the Pacific Cold

Storage Co., Nome, Alaska,) or taking, sending, or permitting to be sent without the District of Alaska, or the jurisdiction of this Court, postal warrant No. 363,766, bearing date July 29th, 1914, for \$3903.02, this being a warrant received by you on account of the contract of August 9th, 1909, set forth in plaintiff's complaint, or any other postal warrants received or hereafter received by you on account of said contract of August 9th, 1909, in payment of any services on U. S. Mail Route No. 78136.

Done in open court at Nome, Alaska, this 18th day of September, 1914.

J. R. TUCKER,
District Judge.

[Endorsed]: Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome, Sep. 18, 1914. G. A. Adams, Clerk. By _____, Deputy. [42]

The defendant at the time of the making of the order last hereinbefore set out duly excepted thereto.

The plaintiff on September 18th, 1914, filed an approved undertaking for said order in amount as fixed by the Court.

On September 26th, 1914, the Court made and entered its order appointing a receiver herein, in words and figures as follows, to wit: [43]

Order Appointing Receiver.

(Title Court and Cause.)

This matter coming on for hearing upon the motion of the plaintiff for a receiver, and the Court having heard all the evidence and affidavits sub-

mitted and being fully advised in the premises, and finding that a receiver of the Court is necessary to take, receive and hold the assets of the partnership described in the written contract set forth in the plaintiff's complaint pending the further and final decree and order of the Court,

NOW, THEREFORE, It is by the Court HEREBY ORDERED that a receiver be appointed and that G. A. Adams, Clerk of the above-entitled court, be and he is hereby appointed receiver of said copartnership with authority to demand, receive and hold, subject to the further and final order of the Court, from plaintiff and defendant, all postal warrants received in payment of services rendered under contract of August 25th, 1909, U. S. Mail Route No. 78136, and particularly United States postal warrant No. 363,766, bearing date July 29, 1914, for \$3903.02 issued in payment of services rendered under said contract, or any other warrants received thereunder, and the parties hereto are further ORDERED AND DIRECTED to deliver all said warrants to said receiver immediately.

Done in open court this 26th day of September, 1914.

J. R. TUCKER,
District Judge.

[Endorsed]: Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome, Sep. 26, 1914. G. A. Adams, Clerk. By W. C. McG., Deputy. [44]

The defendant at the time of the making of said order last above set forth duly excepted thereto.

Defendant while objecting and excepting to said order stated through his counsel that if a receiver was to be appointed, he had no objection to the appointment of the clerk.

[Order Settling and Allowing Bill of Exceptions.]

The foregoing BILL OF EXCEPTIONS contains all the evidence introduced at the hearings therein set forth, and said bill having been served, filed and presented for settlement by defendant, within the time allowed by law and extensions thereof made by orders duly entered, and being found full, true and correct, is hereby settled and allowed.

Dated at Nome, Alaska, October 17th, 1914.

J. R. TUCKER,

Judge of the District Court, District of Alaska,
Second Div.

The foregoing is defendant's proposed Bill of Exceptions in the action therein entitled.

October 13, 1914.

G. J. LOMEN,

LYONS & ORTON,

Attorneys for Defendant. [45]

Service by receipt of a copy of the within Bill of Exceptions admitted at Nome, Alaska, this 13th day of October, 1914.

WILLIAM A. GILMORE,

Attorney for Plaintiff.

[Endorsed]: No. 2531. In the District Court for the District of Alaska, Second Division. Eugene Chilberg, Plaintiff, vs. John Hegness, Defendant.

Bill of Exceptions. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 13, 1914. G. A. Adams, Clerk. By _____, Deputy. Refiled in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 17, 1914. G. A. Adams, Clerk. By W. C. McG., Deputy. [46]

*In the District Court for the District of Alaska,
Second Division.*

EUGENE CHILBERG,

Plaintiff,

vs.

JOHN HEGNESS,

Defendant.

Opinion.

The complaint in this case sets up an alleged written contract of partnership between the plaintiff and the defendant concerning the obtaining of a mail contract and the carrying of mail between certain points in Alaska, Second Division. The alleged contract is fully set forth in the complaint, and is as follows:

“MEMORANDUM OF AGREEMENT, made and entered into this 25th day of August, 1909, by and between EUGENE CHILBERG, of Nome, Alaska, party of the first part, and JOHN HEGNESS, also of Nome, Alaska, party of the second part,

WITNESSETH:

THAT, WHEREAS, the parties hereto are de-

sirous of securing mail contract to carry the United States mail between Nome, Alaska, and Unalakleet, Alaska, and are desirous of bidding upon Proposal Route No. 78136 and Proposal Route No. 78137, in the name of the party of the second part; and

WHEREAS, the parties are desirous of forming a copartnership for the purpose of operating the said mail routes, or either of them should the said contracts be obtained, and are desirous of evidencing the terms of their said copartnership in writing;

NOW, THEREFORE, for and in consideration of the mutual promises and other good considerations, it is agreed between the parties hereto as follows:

First. That each of the parties hereto shall endeavor so far as he can to obtain the said contracts above mentioned, or either of them and to that end the party of the first part agrees to advance all necessary funds needed for such purpose and to obtain the bond required in the proposals for said mail routes, and if either or both of said contracts are secured party of the first part agrees to furnish the necessary bond required [47] by the Government therefor, and to advance the necessary money to begin and operate the said mail route or routes under the said contract or contracts until the payments are made by the government according to the contract or contracts.

Second. Party of the second part agrees to furnish his own dog team, sled and equipment and give his personal services as a carrier on said route or routes, and shall reside when not on the mail route,

in the Town of Nome, and give his personal attention and supervision to the fulfilment and carrying out of the said contract or contracts, if the same is obtained in his name as bidder.

Third. That the party of the second part shall receive the same compensation for his personal services for his attention to the said work as the other carriers employed by this partnership, and shall receive in addition thereto fifteen per cent (15%) of the net profits derived or made from the said contract or contracts after all other expenses are paid.

Fourth. That the party of the first part for his share shall receive eighty-five per cent (85%) of the net profits derived or made from the said contract or contracts after all expenses are paid for operating the same.

Fifth. That all warrants issued and delivered by the government in payment under the said contract or contracts shall be signed by the party of the second part and delivered to the party of the first part, or his representative or agent, who shall keep a strict and accurate account of the same and act as treasurer of the partnership.

IN WITNESS WHEREOF the said parties hereto have hereunto set their hands and seals the day and year first above written.

(Signed) EUGENE CHILBERG. (Seal)

(Signed) JOHN HEGNESS. (Seal)

Signed, sealed and delivered in the presence of:

(Signed) WILLIAM A. GILMORE.

(Signed) MABEL SEARL."

Plaintiff alleges that the defendant has already

disregarded this contract and threatens to further disregard the same, and alleges generally a disagreement between the parties as to the division of the profits arising from said contract, etc. The complaint then prays for a temporary restraining order against the defendant until a final hearing of the case, and that an accounting may be had as to the funds of said partnership.

To the complaint, the defendant interposes a general demurrer; first, on the ground that such contract is illegal, because [48] against public policy, and second, that neither the allegations of the complaint nor the terms of the alleged contract show a legal partnership between the parties, but only an ordinary contract, in which the plaintiff is merely a contract creditor of the defendant.

The law as especially applicable to the consideration of the demurrer in this case may be stated as follows:

“It is a fundamental rule of pleading that a demurrer will only lie for defects which appear upon the face of the pleading to which it is opposed.”

And, in an action upon a written contract, the contract must be construed upon demurrer by the light afforded by the declaration alone, and not by circumstances suggested, but which do not appear upon the face of the declaration; and, further, the illegality of a contract sued on must appear upon the face of the complaint, or it cannot be taken advantage of by demurrer.

Encyc. Plead. & Prac., Vol. 6, p. 297, and cases cited in note 4, etc.

Generally and affirmatively speaking, it is undoubtedly the law that a contract against public policy is illegal and cannot be enforced, but, as said in *McCowen v. Pew*, 21 L. R. A., N. S., page 800,

“A contract should not be declared to be in contravention of public policy unless it is apparent that it controverts some public statute, or is against good morals, or that its tendency is to interfere with the public welfare or safety.”

In the last analysis, therefore, every case must be determined from the particular facts involved, or upon the facts as presented by the pleadings. Confining myself, therefore, to a consideration of the contract as set forth in the complaint, as we are bound to do, in passing on the demurrer, I am unable to declare the contract in this case to be illegal. [49]

Counsel for defendant has cited numerous cases in support of his contention that this contract is illegal on its face, as against public policy. But these cases were either not decided upon demurrer, or else the facts in them were so different as to be inapplicable here. In *McMullen v. Hoffman*, 174 U. S. 639, the facts of that case are totally different from the facts here, and the evil intention of the parties, as well as the evil tendency of the contract, is most flagrant. I fail to see, as was held in that case, where the contract here discloses any tendency to lessen the bids, or that the parties thereto committed fraud in combining their interests and conceal-

ing the same and submitting different bids as if they were *bona fide*. The contract here shows on its face nothing more or less than an agreement that the parties shall endeavor to obtain a contract for carrying the mail in Alaska, and that they shall divide the net profits upon an agreed percentage basis, after the objects of the contract are completed and after the money due on same is paid by the United States. There is no suggestion of a purpose to lessen the bids, nor is that the effect or tendency of the contract.

In *King v. Winents*, 17 Am. Rep., page 11, the parties were rival bidders for a Government contract, and it affirmatively appears that they agreed not to bid against each other, so as to enable one or both to get the contract at a much higher rate, and to divide the profits among them; there was nothing of the kind in this case, or, at least, the contract does not show such state of facts on its face. Much stress was placed in argument upon the case of *Tool Co. v. Norris*, 2 Wallace, 45 (69 U. S.). In that case there was an agreement for compensation (contingent) for procuring a contract from the Government for furnishing its supplies. The [50] precise terms of the contract do not appear, but no one can read the statement of the facts without being shown the lobbying done by the plaintiff and the lobbying character of his contract. I am aware that it was said in that case that "agreements for compensation contingent upon success suggest a use of sinister and corrupt means for the accomplishment of their ends," but this case can have no just applica-

tion to the contract now under consideration,—a contract of partnership to obtain a mail contract and to divide the net profits after the Government payments are completed, without a scintilla of evidence of any lobbying influence,—so glaring in the Tool case; from the very nature of the contract in the Tool case, its lobbying and corrupting tendency was obvious, and the personal conduct of the plaintiff, as shown by the evidence, deserved the severest censure and condemnation.

In *Meguire v. Corwine*, 101 U. S. 108, the case went to a jury upon the evidence. The contract was for the appointment of a special counsel for the Government upon a contingent fee. The facts of the case show fraud, and the tendency of the contract involved necessarily the device of lobbying and undue solicitation for said employment.

The case of *McConaghy v. Clark*, 77 Pac. 1084, is so totally unlike the case here that it is hardly necessary to refer to it. It was substantially, however, a question of substituting another for the real mail contractor, which, of course, the Court held could not be done without the consent of the Postoffice Department. No such substitution was contemplated in the contract involved in this case.

The case of *Marshall v. B. & O. Railroad Co.*, 14 How. 314, was clearly a lobbying contract of the first order, and can have no bearing on the case here; so was the case of *Trist v. Child*, 21 Wal. [51] 441, clearly a case of a contract for “lobbying services.” In the last case, the Court said at page 451:

“The agreement in the present case was for

the sale of the influence and exertions of the lobbying agent to bring about the passage of a law for the payment of a private claim, without reference to its merits, by means which, if not corrupt, were illegitimate, and, considered in connection with the pecuniary interest of the agent at stake, contrary to the plainest principles of public policy. No one has a right, in such circumstances, to put himself in a position of temptation to do what is regarded as so pernicious in its character. The law forbids the inchoate step, and puts the seal of its reprobation upon the undertaking.”

While this Court heartily indorses the language above quoted, in this case it sees no application to the facts of the case cited by the defendant; and, while it also indorses the language of the Court in *McMullen v. Hoffman*, *supra*, condemning contracts that tend to lessen competition and suggest a fraudulent combination of interests and concealment by the parties to it,—it fails to discover on the face of the contract alleged in the complaint here, any such suggestion that would bring this contract within any of the cases above referred to.

As opposed to the cases relied on by the defendant, we now consider the case of *Hobbs v. MacLean*, 117 U. S. 567. That case was not a mail contract, it is true, but the essential facts of the case are almost identical with the case at bar. It was a partnership formed with respect to a Government contract which the party expected to and did subsequently obtain; the contention that this contract was

evil in its intention could have been advanced as forcibly in that case as in the case at bar, but it was scarcely considered; the Court confined itself almost entirely to the question as to whether there was an assignment such as is forbidden by sections 3477 and 3737 of the Revised Statutes. Comparing the case at bar with the many cases cited by the defendant and heretofore referred [52] to, in which the facts and circumstances appear showing the evil tendency of the particular contracts, emphasizes the rule that a contract which simply purposes to obtain a Government contract and to divide the net profits therefrom, should not be declared void on its face. This case of *Hobbs v. MacLean* also disposes of the contention that there is any assignment of a claim against the United States by the contract alleged here, as being forbidden by sections 3477 and 3737 of the Revised Statutes, as was the case in *Spofford v. Kirk*, 97 U. S. 484, and the other cases cited in *Hobbs v. MacLean* and relied on by the defendant. The Court said, in *Hobbs v. MacLean*, at page 575:

“When the contract of partnership was made, Peck had no claim which he could present for payment, or on which he could have brought suit. He therefore had no claim, the assignment of which the statute forbids. It is so clear that the articles of partnership do not constitute such an assignment as is forbidden by the sections under consideration, that it would be a waste of words further to discuss the point.”

And, as especially applicable to the case at bar,

the Court further said on page 576:

“For it is a rule of interpretation that, where a contract is fairly open to two constructions, by one of which it would be lawful and the other unlawful, the former must be adopted.”

And further:

“Interpreting the articles in the light of the statute as it is the duty of the Court to do, they were not intended to transfer and do not transfer to the plaintiffs any claim or demand, legal or equitable, against the United States, or any right to exact payment from the Government by a suit or otherwise. They may be fairly construed to be the personal contract of Peck, by which, in consideration of money to be advanced and services to be performed by the plaintiffs, he agreed to divide with them a fund which he expected to receive from the United States on a contract which he had not yet entered into. This is the plainly expressed meaning of the partnership contract, and it is only by a strained and forced construction that it can be held to effect a transfer of Peck’s contract with the United States and be a violation of the statute.” [53]

This language of the Court in *Hobbs v. MacLean*, *supra*, could scarcely be more apposite to the case at bar; and an examination of that case comparing therewith *McMullen v. Hoffman*, *supra*, and similar cases, marks to my mind a clear distinction between the latter cases and the case at bar. See, also, *Northern Pacific Lumber Co. v. Spore*, 75 Pac. Rep.

890, following *Hobbs v. MacLean*; also *Dulaney v. Scudder*, 94 Fed., page 6.

The case of *Bellows v. Russell*, 51 Am. Dec. 238, held:

(1) That an "agreement that one shall bid for several for a mail contract is not void, unless made for some illegal purpose affecting public policy," and,

(2) "Whether a contract was made for an illegal purpose is a question of fact for a jury."

And, this was the holding of the Court, notwithstanding that "when the contract was made, the parties met and, learning that each intended to bid for the mail route named and had made some preparation for that purpose, entered into the written contract," which was quite similar to the contract here. See, also, the case of *Breslin v. Brown*, 15 Am. Rep. 627, which is also quite similar to the case at bar.

An attentive reading of the citations by defendant's counsel from *Lindley*, page 181, and *Parsons*, sec. 39, will, I think show that they do not support his contention, or do not apply to the case here. The contract, stripped of all surplusage, is simply one between the parties:

- (1) To obtain the mail contract;
- (2) To provide the means of performing it; and,
- (3) To divide the net profits, after the Government has paid over the money. That, and that only, is the meaning and scope of the partnership; the contract here does not contemplate a partnership as to the administration of the actual business of the

office of postmaster, as suggested by Mr. Parsons, *supra*, nor does [54] it pretend to be a partnership, with all the incidents of that relation of the parties as to creditors, etc. It is merely a partnership *inter sese* for the purposes indicated above. If it be true, as is the inevitable result of defendant's argument, that all contracts to obtain a Government contract are against public policy and illegal, then this contract should be condemned, but manifestly this is not the law as declared by the Supreme Court in *Hobbs v. MacLean*, *supra*, and other similar cases decided by that Court; in a note to *Houlton v. Dunn*, 30 L. R. A. 737, it is said:

“The line of demarcation between contracts for procuring legislation which are upheld and those which are condemned, seems to be well drawn. All contracts for legitimate professional services for a fixed compensation are enforced; while those for a contingent fee, or which require personal influence, personal solicitation of members, or any trickery or underhanded means to secure the legislation, are not enforced. . . . There are many expressions in opinions of the courts which would lead to a general condemnation of all contracts to procure legislation, and some decisions tend also in that direction. But those expressions are not intended to apply to cases of legitimate services, and the decisions are usually in cases where some evil tendency or influence was apparent. There seems to be no case in which

legitimate services for a fee payment absolute have been condemned.”

See also 4 L. R. A. (N. S.) 312, and note.

We think this a correct statement of the rule, in full accord with Supreme Court (U. S.) decisions, and, while it is made with reference to the procuring of legislation, there is no reason why it should not apply in cases of obtaining mail contracts; and the test of their legality or non-legality made to depend on the fact as to whether or not the contract is legitimate with reference to all the circumstances of each particular case, to be inquired into by the Court or jury; if this be so, the contract here being unobjectionable to any statutory inhibition, under the decision of *Hobbs v. MacLean, supra*, should not be condemned by sustaining the demurrer, unless some evil tendency is apparent upon the face of [55] the contract, and, surely, nothing of this character is apparent on the contract alleged in the complaint.

With respect to the second ground of the demurrer that the complaint, or alleged contract therein, does not state a legal partnership, or rather, that the relation of partners does not exist between the plaintiff and the defendant, it seems very clear to the Court from the terms of the written contract itself that it was the intention of the parties to form a partnership *inter sese*. The plain declaration of the partnership in the written contract, taken alone, is a high, if not conclusive, test of the intention of the parties to form a partnership *inter sese*, and to join together to carry on a

trade or adventure for their common benefit, each contributing property and services and having a community of interests in the profits. As between themselves, the written contract shows unmistakably their intention to form the partnership, with all the requisites of a joint purpose, a joint contribution of services and money and a community of interests in the net profits.

In most of the cases wherein the question has arisen as to whether or not there was a legal partnership between persons who had been dealing together, or jointly, with reference to certain transactions, or property, it did not appear in the written contract, if there was one, any, or rather, a positive declaration of the partnership, or, it has arisen with respect to the partnership, *quoad*, its liability to creditors. Questions of this kind are often difficult of solution, but no such state of facts exists in the case at bar.

Without stating specifically wherein they are applicable [56] to this particular case, the well-known maxims of equity that "He who seeks equity must do equity," and "He who comes into equity must come with clean hands," are cited in defendant's brief; presumably they are cited with reference to the seemingly gross inequality of a division of the net profits between the parties as provided by the contract. It is sufficient to say with respect to that matter that it is a feature of the case which may not be considered on the demurrer, but may come up for consideration and determination when the case is heard on its merits.

See *Feather v. Palm Bros.*, 133 Fed. 466; *Fleming v. Lee*, 109 Fed. 953-955; *Meehan v. Valentine*, 145 U. S. 611, and a very learned and elaborate note to *Cudahy Packing Co. v. Hybon*, 18 L. R. A., pages 981-2-3, etc., and page 1105.

Having reached the conclusion, therefore, that the contract alleged by the complaint is not illegal on its face; that it does not contravene any of the provisions of the Revised Statutes of the United States, and that the complaint sufficiently states and shows the existence of a legal partnership between the parties, and in view of the positive allegations of the complaint of the defendant's insolvency, his actual and threatened diversion of the partnership funds still payable by the Government, and the evident necessity for an accounting between the parties, I am of opinion that the case presented is one of equitable cognizance and demands the equitable interposition of the court. See *High on Receivers*, under title of *Injunctions*, p. 492, sec. 760 and seq.

For these reasons, the demurrer is overruled and the restraining order may be allowed until the final hearing of the case, and it is so ordered.

J. R. TUCKER.

Sept. 12, 1914. [57]

[Endorsed]: No. 2531. In the District Court for the District of Alaska, Second Division. Eugene Chilberg, Plaintiff, vs. John Hegness, Defendant. Opinion. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Sep. 12, 1914. G. A. Adams, Clerk. By _____, Deputy. [58]

*In the District Court for the District of Alaska,
Second Division.*

EUGENE CHILBERG,

Plaintiff,

vs.

JOHN HEGNESS,

Defendant.

**Assignment of Errors [on Appeal from Order
Granting Injunction].**

Now comes the defendant in the above-entitled action and assigns the following errors as having been committed by the Court in making and entering its order granting an injunction *pendente lite* on September 18th, 1914, upon which errors said defendant will and does rely upon his appeal from said order to the United States Circuit Court of Appeals for the Ninth Circuit.

1.

The Court erred in making and entering said injunction order, for the reason that the complaint in this action does not state facts sufficient to constitute a cause of action.

2.

The Court erred in making and entering said injunction order in this, that it appears from the allegations of the complaint that the contract upon which this suit is based is void on its face. [59]

3.

The Court erred in making and entering said injunction order in this, that it appears from the alle-

gations of the complaint that the contract upon which this suit is based is contrary to the statutes of the United States and void.

4.

The Court erred in making and entering said injunction order in this, that it appears from the allegations of the complaint that the contract upon which this suit is based is contrary to the laws and regulations of the Postoffice Department of the United States, and against public policy and void.

5.

The Court erred in making and entering said injunction order in this, that it appears from the allegations of plaintiff's complaint, and the answer and affidavits filed herein that this suit was and is prematurely brought and was brought at a time when said defendant had no postoffice warrants whatever in his possession or under his control.

WHEREFORE, defendant prays that said injunction *pendente lite*, so made and entered on September 18th, 1914, be reversed, and that he be restored to all things which he has lost thereby.

G. J. LOMEN,

LYONS & ORTON,

Attorneys for Defendant and Appellant. [60]

[Endorsed]: No. 2531. In the District Court for the District of Alaska, Second Division. Eugene Chilberg, Plaintiff, vs. John Hegness, Defendant. Assignment of Errors. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 17, 1914. G. A. Adams, Clerk.

By W. C. McG., Deputy. G. J. Lomen, Ira D. Orton, Attorneys for Deft. [61]

*In the District Court for the District of Alaska,
Second Division.*

EUGENE CHILBERG,

Plaintiff,

vs.

JOHN HEGNESS,

Defendant.

**Petition for Appeal [from Order Granting
Injunction] and Order Allowing Appeal.**

Comes now, John Hegness, defendant herein, and believing himself aggrieved by that certain order granting an injunction *pendente lite* herein made and entered on September 18th, 1914, hereby appeals from said order to the United States Circuit Court of Appeals for the Ninth Circuit, and hereby prays that said appeal be allowed and that an order be made fixing the amount of bond for costs on appeal, to be given by the appellant.

G. J. LOMEN,

LYONS & ORTON,

Attorneys for Defendant and Appellant.

On this 17th day of October, 1914, IT IS HEREBY ORDERED that said appeal as above prayed for be allowed and the amount of bond for costs to be given by appellant is hereby fixed at \$250.00.

J. R. TUCKER,

Judge District Court, District of Alaska, Second
Division. [62]

[Endorsed]: No. 2531. In the District Court for the District of Alaska, Second Division. Eugene Chilberg, Plaintiff, vs. John Hegness, Defendant. Petition for Appeal and Order Allowing Same. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 17, 1914. G. A. Adams, Clerk. By W. C. McG., Deputy. G. J. Lomen, Ira D. Orton, Attorneys for Deft. [63]

*In the District Court for the District of Alaska,
Second Division.*

EUGENE CHILBERG,

Plaintiff,

vs.

JOHN HEGNESS,

Defendant.

**Undertaking for Costs on Appeal [from Order
Granting Injunction].**

KNOW ALL MEN BY THESE PRESENTS:
That we, John Hegness, as principal, and S. O. Groven and Ralph Lomen, as sureties, are held and firmly bound unto Eugene Chilberg, the plaintiff in the above-entitled action, in the sum of TWO HUNDRED AND FIFTY DOLLARS, lawful money of the United States of America, for the payment of which, well and truly to be made, we bind ourselves, and our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

SEALED WITH OUR SEALS and dated at Nome, Alaska, this 17th day of October, 1914.

WHEREAS, an order has been made and entered in the above-entitled action allowing the appeal of the defendant to the United States Circuit Court of Appeals for the Ninth Circuit, from a certain interlocutory order made and entered herein on the 18th day of September, 1914, granting an injunction *pendente lite*, and a citation is about to issue citing and admonishing the said plaintiff, Eugene Chilberg, to be and appear at a term of said Court of Appeals to be held in the City of San Francisco, State of California, and show cause why said order should not be reversed; [64]

NOW, THEREFORE, if the appellant, John Hegness, will prosecute said appeal to effect and answer all costs, if he fails to sustain his appeal, then this obligation shall be void; otherwise to remain in full force and effect.

JOHN HEGNESS,

By IRA D. ORTON, [Seal]

His Attorney.

S. O. GROVEN. [Seal]

RALPH LOMEN. [Seal]

United States of America,
District of Alaska,—ss.

S. O. Groven and Ralph Lomen, being first duly sworn, each for himself and not one for the other deposes and says:

That he is a resident of Nome, Alaska, and a surety on the within and foregoing undertaking; that he is not a counsellor or attorney at law, marshal, deputy marshal, commissioner, clerk of any court or other officer of any court, and that he is worth the sum of

\$250.00 over and above all just debts and liabilities and exclusive of property exempt from execution.

S. O. GROVEN.

RALPH LOMEN.

Subscribed and sworn to before me this 17th day of October, 1914.

[Notarial Seal]

D. B. CHACE,

Notary Public, District of Alaska.

My commission expires May 12, 1917. [65]

The foregoing bond is hereby approved this 17th day of October, 1914.

Done in open court.

J. R. TUCKER,

District Judge.

[Endorsed]: No. 2531. In the District Court for the District of Alaska, Second Division. Eugene Chilberg, Plaintiff, vs. John Hegness, Defendant. Undertaking for Costs on Appeal—Injunction Order. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 17, 1914. G. A. Adams, Clerk. By W. C. McG., Deputy. G. J. Lomen, Ira D. Orton, Attorneys for Deft. Civil Bond Record, Vol. 5, Page 384. [66]

*In the District Court for the District of Alaska,
Second Division.*

EUGENE CHILBERG,

Plaintiff,

vs.

JOHN HEGNESS,

Defendant.

Assignment of Errors [on Appeal from Order Appointing Receiver].

Now comes the defendant in the above-entitled action and assigns the following errors as having been committed by the Court in making and entering its order appointing a receiver on September 26th, 1914, upon which errors said defendant will and does rely upon his appeal from said order to the United States Circuit Court of Appeals for the Ninth Circuit.

1.

The Court erred in making and entering said order appointing a receiver for the reason that the complaint in this action does not state facts sufficient to constitute a cause of action.

2.

The Court erred in making and entering said order appointing a receiver in this, that it appears from the allegations of the complaint that the contract upon which this suit is based is void on its face.

3.

The Court erred in making and entering said order appointing a receiver in this, that it appears from the allegations of the complaint that the contract upon which this suit [67] is based is contrary to the statutes of the United States and void.

4.

The Court erred in making and entering said order appointing a receiver in this, that it appears from the allegations of the complaint that the contract upon which this suit is based is contrary to the laws and regulations of the Postoffice Department of the

United States and against public policy and void.

5.

The Court erred in making and entering said order appointing a receiver in this, that it appears from the allegations of plaintiff's complaint and the answer and affidavits filed herein that this suit was and is prematurely brought and was brought at a time when said defendant had no postoffice warrants whatever in his possession or under his control.

WHEREFORE, defendant prays that said order appointing a receiver, so made and entered on September 26th, 1914, be reversed and that he be restored to all things which he has lost thereby.

G. J. LOMEN,

LYONS & ORTON,

Attorneys for Defendant and Appellant.

[Endorsed]: No. 2531. In the District Court for the District of Alaska, Second Division. Eugene Chilberg, Plaintiff, vs. John Hegness, Defendant. Assignment of Errors. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 17, 1914. G. A. Adams, Clerk. By W. C. McG., Deputy. G. J. Lomen, Ira D. Orton, Attorneys for Deft. [68]

*In the District Court for the District of Alaska,
Second Division.*

EUGENE CHILBERG,

Plaintiff,

vs.

JOHN HEGNESS,

Defendant.

Petition for Appeal [from Order Appointing Receiver] and Order Allowing Appeal.

Comes now John Hegness, defendant herein, and believing himself aggrieved by a certain order made and entered herein on the 26th day of September, 1914, appointing a receiver, hereby appeals from said order to the United States Circuit Court of Appeals for the Ninth Circuit, and hereby prays that said appeal be allowed and that an order be made fixing the amount of bonds for costs on appeal to be given by appellant.

G. J. LOMEN,
LYONS & ORTON,

Attorneys for Defendant and Appellant.

On this 17th day of October, 1914, IT IS HEREBY ORDERED that said appeal as above prayed for be allowed, and the amount of the bond for costs to be given by appellant is hereby fixed at \$250.00.

J. R. TUCKER,
Judge District Court, District of Alaska, Second Division. [69]

[Endorsed]: No. 2531. In the District Court for the District of Alaska, Second Division. Eugene Chilberg, Plaintiff, vs. John Hegness, Defendant. Petition for Appeal and Order Allowing Same. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 17, 1914. G. A. Adams, Clerk. By W. C. McG., Deputy. G. J. Lomen, Ira D. Orton, Attorneys for Deft. [70]

*In the District Court for the District of Alaska,
Second Division.*

EUGENE CHILBERG,

Plaintiff,

vs.

JOHN HEGNESS,

Defendant.

**Undertaking for Costs on Appeal [from Order
Appointing Receiver].**

KNOW ALL MEN BY THESE PRESENTS:
That we, John Hegness, as principal, and S. O. Groven and Ralph Lomen, as sureties, are held and firmly bound unto Eugene Chilberg, the plaintiff in the above-entitled action, in the sum of TWO HUNDRED AND FIFTY DOLLARS, lawful money of the United States of America for the payment of which, well and truly to be made, we bind ourselves, and our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

SEALED WITH OUR SEALS and dated at Nome, Alaska, this 17th day of October, 1914.

WHEREAS, an order has been made and entered in the above-entitled action allowing the appeal of the defendant to the United States Circuit Court of Appeals for the Ninth Circuit, from a certain interlocutory order made and entered herein on the 26th day of September, 1914, appointing a receiver, and a citation is about to issue citing and admonishing the said plaintiff, Eugene Chilberg, to be and appear at a term of said Court of Appeals to be held in the

City of San Francisco, State of California and show cause why said order should not be reversed;

NOW, THEREFORE, if the appellant, John Hegness, will [71] prosecute said appeal to effect and answer all costs, if he fails to sustain his appeal, then this obligation shall be void; otherwise to remain in full force and effect.

JOHN HEGNESS,

By IRA D. ORTON, [Seal]
His Atty.

S. O. GROVEN. [Seal]

RALPH LOMEN. [Seal]

United States of America,
District of Alaska,—ss.

S. O. Groven and Ralph Lomen, being first duly sworn, each for himself and not one for the other deposes and says:

That he is a resident of Nome, Alaska, and a surety on the within and foregoing undertaking; that he is not a counsellor or attorney at law, marshal, deputy marshal, commissioner, clerk of any court or other officer of any court, and that he is worth the sum of \$250.00 over and above all just debts and liabilities and exclusive of property exempt from execution.

S. O. GROVEN.

RALPH LOMEN.

Subscribed and sworn to before me this 17th day of October, 1914.

[Notarial Seal]

D. B. CHACE,

Notary Public, District of Alaska.

My commission expires May 12, 1917.

The foregoing bond is hereby approved this 17th day of October, 1914.

Done in open court.

J. R. TUCKER,
District Judge. [72]

[Endorsed]: No. 2531. In the District Court for the District of Alaska, Second Division. Eugene Chilberg, Plaintiff, vs. John Hegness, Defendant. Undertaking for Costs on Appeal Order Apptg. Receiver. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 17, 1914. G. A. Adams, Clerk. By W. C. McG., Deputy. G. J. Lomen, Ira D. Orton, Attorneys for Deft. Civil Bond Record, Vol. 5, Page 386. [73]

UNITED STATES OF AMERICA.

District Court, District of Alaska, 2d Division.

Cause No. 2531.

EUGENE CHILBERG,

Plaintiff,

vs.

JOHN HEGNESS,

Defendant.

Praeceptum [for Transcript of Record].

To the Clerk of the Above-entitled Court:

You will please prepare and certify transcript of the record in the above-entitled action consisting of Bill of Exceptions and the appeal papers. Also annex copy of the Court's opinion as required by the

rules of the Court of Appeals.

Oct. 19.

IRA D. ORTON,
Of Attys. for Deft.

[Endorsed]: Cause No. 2531. District Court, District of Alaska, 2d Division. Chilberg, Plaintiff, vs. Hegness, Defendant. Praecipe. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 19, 1914. G. A. Adams, Clerk. By ———, Deputy. [74]

**[Certificate of Clerk U. S. District Court to
Transcript of Record.]**

*In the District Court for the District of Alaska,
Second Division.*

No. 2531.

EUGENE CHILBERG,

Plaintiff,

vs.

JOHN HEGNESS,

Defendant.

I, G. A. Adams, Clerk of the District Court of Alaska, Second Division, do hereby certify that the foregoing typewritten pages, from 1 to 74, both inclusive, are a true and exact transcript of the Bill of Exceptions, Court's Opinion on Demurrer, Assignment of Errors on Order Granting Injunction Pendente Lite, Petition for Appeal and Order Allowing Same, Undertaking for Costs on Appeal, Assignment of Errors on Order Appointing a Receiver, Petition

for Appeal and Order Allowing Same, Undertaking for Costs on Appeal and Praecipe for Transcript of Record, in the case of Eugene Chilberg, Plaintiff, vs. John Hegness, Defendant, No. 2531—Civil, this Court, and of the whole thereof, as appears from the records and filed in my office at Nome, Alaska; and further certify original Citations (2) in the above-entitled cause are attached to this transcript.

Cost of transcript \$21.75, paid by Ira D. Orton, of attorneys for defendant.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court this 27th day of October, A. D. 1914.

[Seal]

G. A. ADAMS,
Clerk. [75]

**Citation [on Appeal from Order Granting Injunction
(Original)].**

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to
Eugene Chilberg, Greeting:

YOU ARE HEREBY cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, State of California, on the 15th day of November, 1914, pursuant to an order allowing an appeal filed in the office of the Clerk of the District Court for the District of Alaska, Second Division, from a certain interlocutory order granting an injunction *pendente lite* filed and entered in said court on the 18th day of September, 1914, in that certain suit wherein you, the said Eugene Chilberg,

are plaintiff, and John Hegness is defendant, to show cause, if any there be, why the said interlocutory order rendered against the said John Hegness, as in said order allowing the appeal mentioned should not be reversed and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 17th day of October, 1914.

J. R. TUCKER,

Judge of the District Court for the District of Alaska, Second Division.

Service of the foregoing citation is hereby admitted at Nome, Alaska, this 17th day of October, 1914.

WILLIAM A. GILMORE,
Of Attorneys for Plaintiff. [76]

[Endorsed]: No. 2531. In the District Court for the District of Alaska, Second Division. Eugene Chilberg, Plaintiff, vs. John Hegness, Defendant. Citation. [77]

**Citation [on Appeal from Order Appointing
Receiver (Original)].**

UNITED STATES OF AMERICA,—ss.
The President of the United States of America, to
Eugene Chilberg, Greeting:

YOU ARE HEREBY cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, State of California, on the 15th day of November, 1914, pursuant to an order allow-

ing an appeal filed in the office of the Clerk of the District Court for the District of Alaska, Second Division, from a certain interlocutory order appointing a receiver filed and entered in said court on the 26th day of September, 1914, in that certain suit wherein you, the said Eugene Chilberg, are plaintiff, and John Hegness is defendant, to show cause, if any there be, why the said interlocutory order rendered against the said John Hegness, as in said order allowing the appeal mentioned, should not be reversed and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 17th day of October, 1914.

J. R. TUCKER,

Judge of the District Court for the District of Alaska, Second Division.

Service of the foregoing citation is hereby admitted at Nome, Alaska, this 17th day of October, 1914.

WILLIAM A. GILMORE,
Of Attorneys for Plaintiff. [78]

[Endorsed]: No. 2531. In the District Court for the District of Alaska, Second Division. Eugene Chilberg, Plaintiff, vs. John Hegness, Defendant. Citation.

[Endorsed]: No. 2523. United States Circuit Court of Appeals for the Ninth Circuit. John Hegness, Appellant, vs. Eugene Chilberg, Appellee. Transcript of Record. Upon Appeal from the

United States District Court for the District of
Alaska, Second Division.

Received November 10, 1914.

F. D. MONCKTON,
Clerk.

Filed November 27, 1914.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

*In the District Court for the District of Alaska,
Second Division.*

EUGENE CHILBERG,

Plaintiff,

vs.

JOHN HEGNESS,

Defendant.

**Order Enlarging Time to File Record and Docket
Case.**

On motion of counsel for John Hegness, appellant in the above-entitled suit, IT IS HEREBY ORDERED that the time for filing and docketing the transcript and record in the above-entitled cause in the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, upon appeals from the order granting an injunction *pendente lite* and from the order appointing a receiver, be, and the same is hereby enlarged thirty days after the return day of the citations issued on said appeals.

Done in open court at Nome, Alaska, this 26th day of October, 1914.

J. R. TUCKER,
District Judge.

Service admitted October 26th, 1914.

WILLIAM A. GILMORE,
Atty. for Plf.

[Endorsed]: 2531. In the District Court for the District of Alaska, Second Division. Eugene Chilberg, Plaintiff, vs. John Hegness, Defendant. Order Enlarging Time. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 26, 1914. G. A. Adams, Clerk. By ———, Deputy. L. G. J. Lomen, Ira D. Orton, Attorneys for Deft.

United States of America,
District of Alaska,
Second Division,—ss.

I, G. A. Adams, Clerk of the District Court for the District of Alaska, Second Division, do hereby certify that I have compared the foregoing copy with the original order enlarging time to file record and docket case in the U. S. Circuit Court of Appeals for the Ninth Circuit, San Francisco, Cal., in the case of Eugene Chilberg, Plaintiff, vs. John Hegness, Defendant, No. 2531—Civil, this Court, now on file and of record in my office at Nome, in the District of Alaska, and the same is a true and perfect transcript of said original and of the whole thereof.

Witness my hand and the seal of said court this
27th day of October, A. D. 1914.

[Seal]

G. A. ADAMS,

Clerk.

By W. C. McGuire,

Deputy.

[Endorsed]: No. 2531. In the District Court for
the District of Alaska, Second Division. Eugene
Chilberg, Plaintiff, vs. John Hegness, Defendant.
Certified Copy. Order Enlarging Time to File Rec-
ord and Docket Case.

No. 2523. United States Circuit Court of Appeals
for the Ninth Circuit. Order Under Rule 16 En-
larging Time to Dec. 16, 1914, to File Record Thereof
and to Docket Case. Filed Nov. 10, 1914. F. D.
Monckton, Clerk. Refiled Nov. 27, 1914. F. D.
Monckton, Clerk.

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JOHN HEGNESS,

vs.

EUGENE CHILBERG,

Appellant,

Appellee.

No. 2523

Brief for Appellant

G. J. LOMEN

Nome, Alaska.

IRA D. ORTON,

THOMAS R. LYONS,

1102-05 Alaska Building, Seattle, Washington,

Attorneys for Appellant.

Filed

FEB 23 1915

F. D. [illegible]

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JOHN HEGNESS,

Appellant,

vs.

EUGENE CHILBERG,

Appellee.

No. 2523

Brief for Appellant

G. J. LOMEN

Nome, Alaska.

IRA D. ORTON,

THOMAS R. LYONS,

1102-05 Alaska Building, Seattle, Washington,

Attorneys for Appellant.

IN THE

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JOHN HEGNESS,

Appellant, }

vs.

EUGENE CHILBERG,

Appellee. }

Brief for Appellant

STATEMENT OF THE CASE.

The appellee, Eugene Chilberg, brought this suit against John Hegness, to have an accounting of the business of a partnership alleged to have been formed by a written agreement between the parties reading as follows:

“MEMORANDUM OF AGREEMENT, made and entered into this 25th day of August, 1909, by and between EUGENE CHILBERG of Nome, Alaska, party of the first part, and JOHN HEGNESS, also of Nome, Alaska, party of the second part, WITNESSETH:

THAT WHEREAS, the parties hereto are desirous

of securing mail contract to carry the United States mail between Nome, Alaska, and Unalakleek, Alaska, and are desirous of bidding upon Proposal Route No. 78136 and Proposal Route No. 78137, in the name of the party of the second part; and

WHEREAS, the parties are desirous of forming a co-partnership for the purpose of operating the said mail routes, or either of them, should the said contracts be obtained, and are desirous of evidencing the terms of their said copartnership in writing;

NOW, THEREFORE, for and in consideration of the mutual promises and other good considerations, it is agreed between the parties hereto as follows:

First. That each of the parties hereto shall endeavor so far as he can to obtain the said contracts above mentioned, or either of them, and to that end the party of the first part agrees to advance all necessary funds needed for such purposes and to obtain the bond required in the proposals for said mail routes, and if either or both of said contracts are secured, party of the first part agrees to furnish the necessary bond required by the Government therefor, and to advance the necessary money to begin and operate the said mail route or routes under the said contract or contracts until the payments are made by the Government according to the contract or contracts.

Second. Party of the second part agrees to furnish his own dog team, sled and equipment and give his personal service as a carrier on said route or routes, and shall reside, when not on the mail route, in the Town of Nome, and give his personal attention and supervision to the fulfillment and carrying out of said contract or contracts, if the same is obtained in his name as bidder.

Third. That the party of the second part shall receive the same compensation for his personal services for his attention to the said work as the other carriers employed by this partnership, and shall receive in addition thereto fifteen per cent (15%) of the net profits derived or made from the said contract or contracts, after all other expenses are paid.

Fourth. That the party of the first part for his share shall receive eighty-five per cent (85%) of the net profits derived or made from the said contract or contracts after all expenses are paid for operating the same.

Fifth. That all warrants issued and delivered by the Government in payment under the said contract or contracts shall be signed by the party of the second part and delivered to the party of the first part or his representative or agent, who shall keep a strict and accurate account of the same and

act as treasurer of the partnership.

IN WITNESS WHEREOF the said parties hereto have hereunto set their hands and seals the day and year first above written.

(Signed) EUGENE CHILBERG (Seal)

(Signed) JOHN HEGNESS (Seal)

Signed, sealed and delivered in the presence of:

(Signed) WILLIAM A. GILMORE,

(Signed) MABEL SEARL."

The complaint, after setting forth the written contract as above, alleges in substance that after execution of the contract the plaintiff and defendant, in the name, however, of defendant, obtained the contract for carrying the mail between Unalakleet and Nome, Alaska, for a period of four years at a rate of \$16,000.00 per year, to expire in the summer of 1914 (Tr. p. 4).

Chilberg, plaintiff in the court below, in his complaint alleges "that the said mail contract was secured from the United States Government for the plaintiff and defendant under the terms of said co-partnership agreement, *through the efforts of the plaintiff and without any aid or assistance from said defendant.*".. (Tr. p. 4-5.)

After allegations that the defendant Hegness had and was threatening to retain more than his share of the money paid and to be paid by the

Government, plaintiff prayed for judgment as follows:

“Wherefore plaintiff prays for an order and decree of the court as follows:

First. That the court enter a temporary restraining order restraining and enjoining the said defendant from secreting or cashing any of the warrants hereafter received by him from the United States Government in payment of any mail services rendered between Unalakleek and Nome, Alaska, until the final hearing and determination of this action, and the court further order and direct the said defendant to deliver all of said warrants to the said Pacific Cold Storage Company, treasurer of said co-partnership.

Second. That the court compel the defendant to account to the plaintiff for all money and warrants received for said mail services during the term of said co-partnership agreement, and that the court render an accounting between plaintiff and defendant of all things embraced within the scope of said co-partnership and by its decree dissolve said co-partnership.

Third. That upon the final hearing and accounting in this case, the court render its decree and judgment in favor of the plaintiff and against the defendant for the amount due from said defendant

to the plaintiff.

Fourth. That the plaintiff do have and recover from the defendant his costs and disbursements in this action, and for such other and further relief as shall seem to the court meet and proper."

A temporary restraining order was issued (Tr. p. 12), and after hearings the court, on September 18, 1914, made and entered an injunction *pendente lite*, the ordering part of which is as follows:

"NOW ORDERS AND DIRECTS that pending the final determination and decree or other order of this court, you, John Hegness, defendant, your attorneys and agents, be, and each of you are hereby enjoined from secreting, cashing, assigning or disposing of (except to the Pacific Cold Storage Co., Nome, Alaska) or taking, sending, or permitting to be sent without the District of Alaska, or the jurisdiction of this court, postal warrant No. 363,766, bearing date July 29th, 1914, for \$3,903.02, this being a warrant received by you on account of the contract of August 9th, 1909, set forth in plaintiff's complaint, or any other postal warrants received or hereafter received by you on account of said contract of August 9th, 1909, in payment of any services on U. S. Mail Route No. 78136." (Tr. pp. 52-53.)

Afterwards, on September 26th, 1914, the court made and entered an order appointing a receiver,

the ordering part of which is as follows:

“Now, THEREFORE, It is by the court HEREBY ORDERED that a receiver be appointed and that G. A. Adams, clerk of the above-entitled court, be and he is hereby appointed receiver of said co-partnership with authority to demand, receive and hold, subject to the further and final order of the court, from plaintiff and defendant, all postal warrants received in payment of services rendered under contract of August 25th, 1909, U. S. Mail Route No. 78136, and particularly postal warrant No. 363,766, bearing date July 29th, 1914, for \$3,903.02, issued in payment of services rendered under said contract, or any other warrants received thereunder, and the parties hereto are further ORDERED AND DIRECTED to deliver all said warrants to said receiver immediately.” (Tr. pp. 53-54.)

The defendant duly excepted to each of said orders (Tr. pp. 53 and 54). A bill of exceptions was duly settled containing all the evidence used on the hearings (Tr. p. 55), and defendant in due time perfected appeals to this court from said order of injunction *pendente lite* and appointing receiver (Tr. pp. 73 and 79).

The questions arising on both appeals are the same.

SPECIFICATIONS OF ERRORS.

The assignments of error upon the appeal from the order of injunction *pendente lite* are as follows:

I.

“The court erred in making and entering said injunction order, for the reason that the complaint in this action does not state facts sufficient to constitute a cause of action.

2.

The court erred in making and entering said injunction order in this, that it appears from the allegations of the complaint that the contract upon which this suit is based is void on its face.

3.

The court erred in making and entering said injunction order in this, that it appears from the allegations of the complaint that the contract upon which this suit is based is contrary to the statutes of the United States and void.

4.

The court erred in making and entering said injunction order in this, that it appears from the allegations of the complaint that the contract upon which this suit is based is contrary to the laws and

regulations of the Postoffice Department of the United States, and against public policy and void.

5.

The court erred in making and entering said injunction order in this, that it appears from the allegations of plaintiff's complaint and the answer and affidavits filed that this suit was and is prematurely brought and was brought at a time when said defendant had no postoffice warrants whatever in his possession or under his control."

The assignments of error upon the appeal from the order appointing receiver are as follows:

1.

"The court erred in making and entering said order appointing a receiver for the reason that the complaint in this action does not state facts sufficient to constitute a cause of action.

2.

The court erred in making and entering said order appointing a receiver in this, that it appears from the allegations of the complaint that the contract upon which this suit is based is void on its face.

3.

The court erred in making and entering said

order appointing a receiver in this, that it appears from the allegations of the complaint that the contract upon which this suit is based is contrary to the statutes of the United States and void.

4.

The court erred in making and entering said order appointing a receiver in this, that it appears from the allegations of the complaint that the contract upon which this suit is based is contrary to the laws and regulations of the Postoffice Department of the United States and against public policy and void.

5.

The court erred in making and entering said order appointing a receiver in this, that it appears from the allegations of plaintiff's complaint and the answer and affidavits filed herein that this suit was and is prematurely brought and was brought at a time when said defendant had no postoffice warrants whatever in his possession or under his control."

Argument.

I.

THE CONTRACT SUED ON IS AGAINST PUBLIC POLICY
AND VOID UPON GENERAL PRINCIPLES OF LAW
BECAUSE ITS TENDENCY IS TO PREVENT OR DI-
MINISH COMPETITION.

Greenhood, in his work on *Public Policy*, p. 178,
says:

“Rule CLXXII. Any agreement which in its object or nature is calculated to diminish competition for the obtainment of a public or *quasi* public contract to the detriment of the public or those awarding the contract, is void.”

The first illustration given by Greenhood under this general rule is exactly in point. It is thus stated by that author:

“A contract for making a certain public road is about to be let at auction to the lowest bidder. A and B agree that one of them only should bid for the contract, and, if it should be awarded to one, the other should have an equal share in it. The agreement is void.”

Wilbur vs. How., 8 Johns (N. Y.), 444.

In determining whether the contract in the case at bar is void, for the reasons under discussion, it need not appear that the agreement really did produce any result detrimental to the public interest, but it is sufficient if the agreement tends directly or indirectly to restrain or lessen the rivalry and

competition between bidders.

Atcheson vs. Mallon, 43 N. Y. 147.

In the case just cited it appeared that the board of auditors of a New York town had according to law advertised for sealed bids for the collection of taxes which the law required to be awarded "to the person offering terms most favorable to the town." Plaintiff and defendant both bid, but agreed "that, if either obtained the award of the collection of taxes, both should share equally in the profits and be liable to an equal share of the losses." The contract was awarded to defendant, who performed it but refused to account to plaintiff, who sued for an accounting. The agreement was held void as against public policy, Folger, J., saying:

"It is not necessary, for the determination of the case, to inquire whether the effect of the agreement between the parties was in fact detrimental to the town of Oswegatchie. The true inquiry is, is it the natural tendency of such an agreement to injuriously influence the public interests? The rule is, that agreements which in their necessary operation upon the action of the parties to them, tend to restrain their natural rivalry and competition, and thus to result in the disadvantage of the public, or of third parties, are against the principles of sound public policy and are void (*Gulick vs. Bailey*, 5 Halst. 87; *Mills vs. Mills*, 40 N. Y. 545-6.)

The object of the act of 1856 is plain. It was to reduce to the taxpayers of the town of Oswegatchie the expense of the collection of taxes upon them, either directly, by securing the collection at

a lower rate of compensation therefor, or indirectly, by the payment into the town treasury of a bonus in money, for the privilege of serving as collector. The object and policy of the statute was to be achieved only by exciting the rivalry and competition of men seeking this privilege. This competition was to be excited by advertisement for sealed and secret proposals. Each bidder, ignorant of what his rival was about to offer, would be under a stimulus, to make a bid at the best rate to the town, which his judgment would sanction, as of profit to himself. Whatever made known to one bidder the views and proposals of another, abated his stimulus, and tended to weaken the rivalry and deaden competition. And when an agreement was made between bidders, to share in the acceptance of an offer to either, it is apparent that the competition must materially slacken. Each of the parties had intended making a proposal on his own account, and it was after each knew of the other's intention that the agreement between them was proposed and entered into. Until it can be truthfully said that men's actions will not be affected by a consideration of their self-interest, it cannot be maintained that the parties to this agreement were likely, after it was formed, to be as strong competitors as they were before. Such is the natural effect of agreements of this nature; and it is for this reason, and not on account of the actual results upon the public or upon third persons of particular contracts, that they are held void. It is because men, with these agreements in their hands, and relying upon them for their gain, do not act toward the public and third persons as they would without them; under the stimulus of competing opposition."

The case of *Hoffman vs. McMullen*, 83 Fed. 372, decided by this court, and afterwards affirmed by the Supreme Court of the United States (174 U. S.

639), is, in our opinion, directly in point. The facts in the case just cited were substantially as follows: The water committee representing the city of Portland having advertised for bids to construct a pipe line, the parties entered into an agreement by which the defendant Hoffman bid for the work in the name of Hoffman & Bates. The plaintiff, McMullen, with the knowledge and concurrence of the defendant, made a separate bid in the name of the San Francisco Bridge Company, a company controlled by him. This bid was some \$49,000 higher than the bid of the defendant. The contract having been awarded to the defendant, a written agreement of partnership was entered into by the parties for the execution of the contract to be entered into by the defendant with the city.

This partnership agreement provided that Hoffman & Bates, as first parties, and John McMullen, as second party, should each pay one-half of the expense of executing the contract, and each receive one-half of the profits or bear one-half of the loss resulting therefrom. The contract was awarded on defendant's bid, and proved a profitable one, the profits thereunder being nearly \$140,000.00. Hoffman refused to account to McMullen for any part of the profits, "upon the ground that the bids made by them tended, under the circumstances, to lessen

competition, and operated as a fraud upon the city, and could not be enforced in equity, and upon the further ground that McMullen wholly failed to comply with the contract between the parties, and refused to perform the conditions upon which the defendant's agreement, to share the earnings of the contract with the plaintiff, was made."

The court held the partnership agreement void, and denied plaintiff any relief. Hawley, J., stated the general principle as follows (83 Fed. 372, 376):

"A contract to prevent competition and bidding for public works is contrary to public policy and cannot be enforced. The rule is universal that agreements which, in their necessary operation upon the action of the parties, tend to restrain their natural rivalry and competition, and thus to result in the disadvantage of the public or third parties, are against the principle of sound public policy, and are void. *Gulick vs. Ward*, 10 N. J. Law, 87, 91; *Swan vs. Chorpenning*, 20 Cal. 182, 185; *Hannah vs. Fife*, 27 Mich. 172, 189; *Weld vs. Lancaster*, 56 Me. 453, 457; *Noyes vs. Day*, 14 Vt. 384; *Gibbs vs. Smith*, 115 Mass. 592; *Doolin vs. Ward*, 6 Johns 194; *Wilbur vs. How*, 8 Johns 444; *Thompson vs. Davies*, 13 Johns 112; *Kelly vs. Devlin*, 58 How. Prac. 487; *Atcheson vs. Mallon*, 43 N. Y. 147; *Hunter vs. Pfeiffer*, 108 Ind. 197, 200, 9 N. E. 124; *King vs. Winants*, 71 N. C. 469, 474; *Durfee vs. Moran*, 57 Mo. 374, 379; *Lawnin vs. Bradley*, 13 Mo. App. 361; *Engelman vs. Skrainka*, 14 Mo. App. 438; *Woodruff vs. Berry*, 40 Ark. 252, 267; *Hyer vs. Traction Co.*, 80 Fed. 839, 844."

Upon appeal to the Supreme Court of the United States, Mr. Justice Peckham, in delivering

the opinion of the court, condemns the contract as void in the most emphatic terms. Some extracts from his opinion are (174 U. S. 639, 19 Sup. Ct. Rep. 839, 842, 843):

“It is in truth utterly impossible to accurately or fully predict all the vicious results to be apprehended as the natural effect of this kind of an agreement. It cannot be said in all cases just what the actual effect may have been. * * *

It might readily be surmised that if these parties had bid in competition, one or both of the bids would have been lower than their combined bid. It was not necessary, however, to prove so difficult a fact. The inference would be natural. In *Richardson vs. Crandall*, 48 N. Y. 348, 362, the court said: ‘In all cases where contracts are claimed to be void, as against public policy, it matters not that any particular contract is free from any taint of actual fraud, oppression or corruption. The law looks to the natural tendency of such contracts. The vice is in the very nature of the contract, and it is condemned as belonging to a class which the law will not tolerate,’ citing *Atcheson vs. Mallon*, 43 N. Y. 147. * * *

Contracts of the nature of this one are illegal in their nature and tendency, and for that reason no inquiry is necessary as to the particular effect of any one contract, because it would not alter the general nature of the contracts of this description, or the force of the public policy which condemns them.”

The case of *Hunter vs. Pfeiffer*, 9 N. E. 124 (Ind.), is exactly on all fours with the case at bar. The facts are thus stated in the opinion of the court:

“On the fifth day of February, 1885, Hunter,

Pfeiffer and two others entered into an agreement to form a partnership, the purpose of which was to secure the contract for building a free gravel road, the construction of which, we may infer from the complaint, had been duly determined upon by the Board of Commissioners of Warren County. The arrangement was that Pfeiffer should attend the letting, which had been advertised, and bid for the work, and secure the contract, and that Hunter, and his associates, should become sureties on the bond required by law in that behalf to be given by the contractor. Pfeiffer bid off the work, and was awarded the contract at the price of \$13,465. The contract for the work was duly executed by the Board to Pfeiffer. Hunter and the other two signed his bond according to the agreement. The plaintiff avers that the contract between Pfeiffer and the Board is worth \$3,000; that \$10,000 is more than sufficient to execute the work according to the agreement. It was further averred that, but for the alleged agreement of partnership, the plaintiff would have bid for and received the contract, and would have made \$1,000 profit thereon. The plaintiff alleges that after the contract was secured, and the bond signed, Pfeiffer and the other two defendants wholly refused to permit him to participate in the prosecution of the work, and excluded him from the partnership which had been agreed upon; that the defendants were proceeding with the work, had already made \$1,000 in profits; and that, when completed, the contract would yield a net profit of \$3,000. He demanded judgment for \$1,000.

On motion of the defendant below, the court struck out that part of the complaint which avers that, but for the alleged agreement of partnership between the parties to the suit, the plaintiff would have bid for and received the contract for the construction of the work proposed and would have made a profit of \$1,000 thereon. The appellant complains of this, and insists that the ruling on the demurrer

to his complaint should be considered here as though the rejected averment remained in."

The opinion of the Supreme Court of Indiana upon the facts just stated is as follows:

"Apart from the averment eliminated, there can be little question of the invalidity of the complaint. With that part considered as in, it is bad beyond any doubt whatever. Without the averment in question, it is fairly inferable from the complaint that the agreement to form a partnership was nothing more nor less than a thinly disguised scheme to stifle or diminish competition for the obtainment of a contract to construct a public work. With the averment in, the real purpose of the partnership is not left to inference; the averment being boldly made that but for the agreement the plaintiff would have bid for and received the contract for the work at a price at which he would have derived a profit of \$1,000. In effect, this is to say that the appellant and appellees were about to bid for the construction of a public work which was to be let in pursuance of law, and that the appellant was induced to withhold a lower bid than that which the appellee proposed to make, in consideration that he should be taken into partnership, and be permitted to share in the profits of a contract which appellee Pfeiffer was thus to secure. Upon all such partnerships the law sets the seal of its condemnation. Persons who combine in schemes of the character disclosed can secure no aid from the courts in coercing a division of profits anticipated or accrued.

The statute under which free gravel or turnpike roads are constructed, requires contracts for their construction to be let to the lowest and best bidder, and that all bids shall be sealed when filed. If the courts should lend any countenance to such a contract for partnership as that disclosed in the complaint in either aspect in which it is presented,

the effect would be to afford facilities for bidders to enter into secret agreements and combinations with each other and thus enable them to defeat the plain purpose of the legislature in requiring such contracts to be let to the lowest and best bidder. The whole purpose of the statute is to encourage open, fair competition between reasonable bidders, and any secret combination—call it partnership or anything else—the effect of which is to abate honest rivalry, or prevent fair competition, is to be condemned as in violation of public policy, and void. No one can predicate an enforceable right upon such an agreement. *Atcheson vs. Malbon*, 43 N. Y. 147; *Woodworth vs. Bennett*, Id. 273; *Gibbs vs. Smith*, 115 Mass. 592; *Hannah vs. Fife*, 27 Mich. 172; *Greenhood, Public Pol.*, 178, 179 and notes.

The partnership contemplated by this agreement was a secret arrangement, unknown to the officers, who had the public interest under their protection. It was intended that the officers should believe they were contracting with Pfeiffer alone, while he and those who were accepted as sureties on his bond intended among themselves a secret partnership wholly unknown to the Board of Commissioners. No lawful contract of partnership resulted from such a combination. *Lewis vs. Armstrong*, 3 Mylne & K. 45. Persons who engage in forming partnerships of the character disclosed must rely for a division of the resulting profits upon those sentiments of honor which are supposed to prevail among all who form combinations which are condemned by the policy of the law.

The purpose, tendency and necessary effect of such a contract was to stifle fair, open, actual competition, and to perpetrate a fraud upon the public officers. If, in letting a contract such as this, parties, without knowledge of the bids of each other, submit their bids as the law requires, and afterwards enter into a partnership for the construction of the work, with the knowledge of the officers letting the same,

a question of a different character is presented. Such a transaction bears some similitude to the contract which was upheld in *Breslin vs. Brown*, 24 Ohio St. 565, a case which, on account of the liberal view taken of the contract there involved, is not universally endorsed. That case, however, affords no aid to the appellant here."

It would be impossible to find a case where the facts were any more similar to the case at bar. Chilberg and Hegness agreed that the bid should be put in in the name of Hegness, which was in fact done and the contract was awarded to Hegness. Chilberg was to furnish the bond. It was to be concealed from the officials of the Post Office Department that Chilberg was in any way interested in the bid. And in fact it was so concealed. It is provided by the regulations of the Post Office Department that "Proposals for carrying mails shall be made on forms prescribed by the Postmaster General."

Postal Laws and Regulations, Ed. of 1913,
Sec. 1414, p. 642.

The forms prescribed by the Postmaster General and which must be used contain the following statement to which the bidder must certify:

"This proposal is made in my own interest, and not by me as the agent of another person or company; with full knowledge of the distance of the route, the weight of the mail to be carried, and all other particulars with reference to the route and

service; and, also, after careful examination of the instructions attached to said advertisement."

It is seen that the parties not only concealed from the officials of the Post Office Department that Chilberg was the party principally interested in the bid, but actually stated and certified that the bid was put in solely in the interest of Hegness.

There is nothing in the law which would prevent Chilberg and Hegness from forming a partnership and openly putting in a joint bid.

As was said in *Atcheson vs. Mallon*, 43 N. Y. 147, 151:

"A joint proposal, the result of honest co-operation, though it might prevent the rivalry of the parties and thus lessen competition, is not an act forbidden by public policy. Joint adventures are allowed. The risk as well as the profit is joint, and openly assumed. The public may obtain at least the benefit of the joint responsibility and the joint ability to do the service. The public agents know all there is in the transaction and can more justly estimate the motives of the bidders and weigh the merits of the bid."

The above quotation from *Atcheson vs. Mallon*, *Supra*, is quoted with approval by the Supreme Court of the United States in *McMullen vs. Hoffman*, 174 U. S. 639, 19 Sup. Ct. Rep. 839, 844, and Mr. Justice Peckham says, of the contract held void in *McMullen vs. Hoffman*:

"We have here nothing to do with the combina-

tion of interest which is open and avowed, which appears on the face of the bid, and which is therefore known to all. Such a combination is frequently proper if not essential; and where no concealment is practiced, and the fact is known, there may be no ground whatever for judging it to be in any manner improper."

This distinction disposes of most of the authorities which at first glance might seem to support the position of the appellee.

In *Page on Contracts*, Vol. 1, p. 629, the rule is thus stated:

"Contracts to stifle bidding partake of the nature of contracts to defraud a third person.

Contracts between two or more prospective competitors to prevent competition in bids for letting public contracts are invalid.

Where the parties agree to let one party bid, the profits to be dividend among them all, no action can be maintained for the recovery of such profits."

In *Cyc.*, Vol. 9, at p. 491, among contracts stated to be void, as against public policy, we find enumerated:

"Agreements not to compete with another in making bids, to withdraw a bid for a public or a quasi public contract, to share in the result or profits, or other agreement having a direct tendency to prevent bidding or competition."

Other authorities not already cited, condemning as against public policy and void contracts similar in principle to the one at bar, are:

Hyer vs. Richmond Traction Co., 168 U. S. 471, 18 Sup. Ct. Rep. 114.

Woodworth vs. Bennett, 43 N. Y. 273.

Ray vs. Mackin, 100 Ill. 246.

Daily vs. Hollis, 66 S. W. (Tex. Civ. App.) 586.

McClelland vs. Citizens' Bank, 82 N. W. (Neb.) 319.

Whalen vs. Harrison, 26 Mont. 316, 67 Pac. 934.

Citizens' Nat. Bank vs. Mitchell, 103 Pac. (Okla.) 720.

The opinion of the court below in the case at bar is printed in full in the transcript (Tr. pp. 56-70). The learned judge of the trial court, while endorsing the doctrine of *McMullen vs. Hoffman*, *Supra*, condemning contracts that tend to lessen competition, and suggest a fraudulent combination of interests and concealment by the parties to it, says that he "fails to discover on the face of the contract alleged in the complaint here any such suggestion that would bring this contract within" the rule of *McMullen vs. Hoffman* and other cases cited (Tr. p. 63). In this we contend the trial court fell into error. The trial court bases its decision upon the following authorities: *Hobbs vs. McLean*, 117 U. S. 567; *Northern Pacific Lumber Co. vs. Spore*, 75 Pac. Rep. 890; *Dulaney vs. Scudder*, 94 Fed. 6; *Bel-lows vs. Russell*, 51 Am. Dec. 238, and *Breslin vs. Brown*, 24 Ohio St. 565.

In *Hobbs vs. McLean*, *Supra*, no question of public policy is involved or discussed. It does not appear from the statement of the case that the

parties to the contract involved had made any agreement as to putting in the bid or bids for the Government contract. On the contrary, it is fairly to be inferred from the statement that the bid had already been put in when the partnership contract was made. All through the opinion of the court in *Hobbs vs. McLean, Supra*, it is assumed that the partnership contract there involved was valid unless it fell within the inhibition of Sections 3437 and 3737, Revised Statutes of the United States. We will come to a discussion of these sections of the law later, but our present argument is directed to the point that the contract sued on in the case at bar is void as against public policy without reference to any statutory law whatever. The distinction between the cases is that in *Hobbs vs. McLean*, a partnership was formed to carry out a contract with the Government, while in the case at bar the partnership was formed for the purpose of bidding upon and obtaining the contract from the Government, and contemplated doing so secretly in the name of one partner only.

The case of *Northern Pacific Lumber Co. vs. Spore*, 75 Pac. 890, is not at all in point. In that case it appears that the contract with the Government was already entered into before any agreement was made whatever by the parties alleged to be partners. *Dulaney vs. Scudder*, 94 Fed. 6, is the

case of an assignment of a Government contract to construct a levee. There is no mention or suggestion in the opinion that there was any collusion about the bidding or that any contractual relations whatever existed between the parties until after the contract was obtained from the Government. In this case, the whole controversy turned on the construction of Rev. Stat., Secs. 3477 and 3737.

The case of *Breslin vs. Brown*, 24 Ohio St. 565, 15 Am. Rep. 627, if it be considered in point, can not be considered as authority. *Greenhood on Public Policy*, p. 181, thus states the case of *Breslin vs. Brown*:

“A Government contract for making public improvements is about to be let to the lowest and best bidder. A files his bid for the work. A then enters into an agreement with B, who is about to file his bid for the same work, to become partners in doing the work in the event that the contract should be awarded to either of them. B then files his bid, and A is awarded the contract. He must permit B to become a partner in the work.”

Greenhood criticizes the case, saying “We do not endorse this decision.” (*Greenhood on Public Policy*, p. 182, note 1.) *Breslin vs. Brown*, *Supra*, is also criticised by the Supreme Court of Indiana in *Hunter vs. Pfeiffer*, 9 N. E. 124, 127, the court describing the Ohio case as one “which on account of the liberal view taken by the contract there involved is not universally endorsed.” Furthermore,

the case of *Breslin vs. Brown, Supra*, cannot be reconciled with the case of *Atcheson vs. Mallon*, 43 N. Y. 147. The Supreme Court of Ohio, in rendering their opinion in *Breslin vs. Brown*, severely criticise the case of *Atcheson vs. Mallon*, and refuse to follow it, saying (15 Am. Rep. 632): "Our attention has been called to a decision of the Court of Appeals of New York (*Atcheson vs. Mallon*, 43 N. Y. 147, 3 Am. Rep. 678) which follows an earlier case in the same state wherein a different conclusion was reached. Much as we esteem the decisions of that court, we cannot follow it to the full extent to which it has applied this rule of public policy."

But the Supreme Court of the United States in *McMullen vs. Hoffman*, 174 U. S. 639, 19 Sup. Ct. Rep. 839, 844, approve, quote from and follow the said case of *Atcheson vs. Mallon*. Also in the case of *Hyer vs. Richmond Traction Co.*, 168 U. S. 471, 18 Sup. Ct. Rep. 114, 117, *Atcheson vs. Mallon* is cited, approved, quoted from and followed upon the very point in question here.

Under these circumstances, even if it be considered in point, *Breslin vs. Brown* cannot be considered as authority.

In the case of *Bellows vs. Russell*, 20 N. H. 427, 51 Am. Dec. 238, it seems that several parties having

ascertained that each intended to bid on a certain mail contract, met together and entered into a contract to make a joint bid. It was held that the contract was not necessarily void. This decision cannot be considered as authority because it is in direct conflict with the decision of this court in the case of *Hoffman vs. McMullen*, 83 Fed. 372, and *McMullen vs. Hoffman*, 174 U. S. 639, as well as many other authorities hereinbefore cited.

Mr. Justice Peckham in *McMullen vs. Hoffman*, *Supra*, says (19 Sup. Ct. Rep. 844):

“It is not too much to say that the most perfect good faith is called for on the part of bidders at these public lettings, so far as concerns their position relating to the bids put in by them or in their interest.”

Can it be said in the case at bar that Chilberg, who was to have eighty-five per cent of the profits of the contract, acted in “perfect good faith” in causing a bid to be made in the name of Hegness and causing Hegness to deceive the officials of the Post Office Department by certifying that the bid was made “in my own interest and not as the agent of another person or company”?

II.

THE CONTRACT SUED ON IS VOID BECAUSE IT IS AN AGREEMENT FOR COMPENSATION TO SECURE A GOVERNMENT CONTRACT AND CONTEMPLATES THE USE OF SECRET AND UNLAWFUL INFLUENCE WITH THE OFFICERS OF THE POST OFFICE DEPARTMENT. It is rare that parties seeking to accomplish an

unlawful purpose are as frank in reducing their contract to writing as in the case at bar. After reciting that the parties form a partnership to bid upon and obtain the mail contract or contracts, in the name of the second party, Hegness, the contract provides (Tr. pp. 2 and 3):

“First, that each of the parties hereto shall endeavor so far as he can to obtain the said contract or contracts above mentioned, or either of them, and to that end the party of the first part agrees to advance all necessary funds needed for such purpose, and to obtain the bonds required in the proposals for said mail routes, and if either or both of said contracts are secured, party of the first part agrees to furnish the necessary bond required by the Government therefor, and to advance the necessary money to begin and operate said mail route or routes under the said contract or contracts until the payments are made by the Government according to the contract or contracts.”

Bearing in mind that the Government furnishes the blank forms for the bids which must be used, and that all that a qualified bidder can lawfully do to obtain a contract is to submit a valid bid and bond, what does the contract mean when it says that Chilberg is to “endeavor so far as he can to obtain the said contracts or either of them, and to that end” also “to advance all necessary funds needed for such purpose”?

In what lawful way could Chilberg spend the money in obtaining the contract?

Why was Chilberg to have nearly a six-sevenths interest in the contract? If not to stifle competition, it must have been to reimburse him for the money he was to expend in obtaining the contract and to compensate him for his influence with the Department.

It would seem almost unnecessary to argue as to the validity of a secret agreement whereby one party was to receive eighty-five per cent of the profits of a Government contract in return for his agreeing, among other things, "to endeavor so far as he can to obtain the said contract," and further agreeing "to advance all necessary funds needed for such purpose." If it should in any manner be considered uncertain that the contract contemplates the use of unlawful means on the part of Chilberg to obtain the contract the allegations of plaintiff's complaint remove all uncertainty. The plaintiff Chilberg specifically alleges in his complaint that although defendant Hegness was the bidder, that the mail contract was really secured "*through the efforts of plaintiff and without any aid or assistance from defendant.*" (Tr. pp. 4-5.)

The precise question came before the Supreme Court of the United States in the case of *Providence Tool Company vs. Norris*, reported in 2 Wall. 45.

In that case it appeared that the Providence

Tool Company, a corporation, "entered into a contract with the Government through the Secretary of War, to deliver to officers of the United States within certain stated periods, twenty-five thousand muskets of a specified pattern at the rate of \$20 a musket. This contract was procured through the exertions of Norris, the plaintiff in the court below, upon a previous agreement with the corporation through its managing agent, that in case he obtained a contract of this kind he should receive compensation for his services proportionate to the extent of the contract. Soon afterwards a dispute arose between the parties as to the amount of compensation to be paid."

After negotiations for a settlement failed, Norris brought suit. The defense was interposed that "An agreement for compensation to procure a contract from the Government to furnish its supplies is against public policy and void."

Mr. Justice Field, in delivering the opinion of the court, said:

"The question, then, is this: Can an agreement for compensation to procure a contract from the Government to furnish its supplies, be enforced by the courts? We have no hesitation in answering the question in the negative. All contracts for supplies should be made with those, and with those only, who will execute them most faithfully and at the least expense to the Government. Consideration

as to the most efficient and economical mode of meeting the public wants should alone control, in this respect, the action of every department of the Government. No other consideration can lawfully enter into the transaction, so far as the Government is concerned. Such is the rule of public policy; and whatever tends to introduce any other elements into the transaction is against public policy. That agreements, like the one under consideration, have this tendency is manifest. They tend to introduce personal solicitation and personal influence as elements in the procurement of contracts; and thus directly lead to inefficiency in the public service and to unnecessary expenditures of the public funds.

We have not met with any adjudication upon an agreement precisely similar, but the principle which determines its invalidity has been asserted in a great variety of cases. It has been asserted in cases relating to agreements for compensation for procuring legislation. These have been uniformly declared invalid, and the decisions have not turned upon the question whether improper influences were contemplated or used, but upon the corrupting tendency of the agreements. Legislation should be prompted solely from considerations of the public good, and the best means of advancing it. Whatever tends to divert the attention of legislators from their high duties, to mislead their judgments, or to substitute other motives for their conduct than the advancement of the public interests, must necessarily and directly tend to impair the integrity of our political institutions. Agreements for compensation, contingent upon success, suggest the use of sinister and corrupt means for the accomplishment of the end desired. The law meets the suggestion of evil, and strikes down the contract from its inception.

There is no real difference in principle between agreements to procure favors from legislative bodies and agreements to procure favors in the shape of contracts from the heads of departments.

The introduction of elements to control the actions of both is the direct and inevitable result of all such arrangements. *Marshall vs. Balt. & O. R. R. Co.*, 16 How. 314; *Harris vs. Roof*, 10 Barb. 489; *Fuller vs. Dame*, 18 Pick 472."

The case of *Providence Tool Company vs. Norris*, *Supra*, has recently been followed and approved in the case of *Hazelton vs. Sheckels*, 202 U. S. 71, 26 Sup. Ct. Rep. 567. The point of this case is thus stated in the syllabus:

"An agreement to sell a tract of land at a specified price if the offer should be accepted within the time mentioned is unenforceable as contrary to public policy where made in part consideration of services rendered before and after the making of the agreement in bringing the property to the attention of committees of Congress as a suitable and appropriate site for a hall of records, although the actual services rendered may have been legitimate."

Mr. Justice Holmes, in delivering the opinion of the court, said:

"Every part of the consideration goes equally to the whole promise, and therefore if any part of it is contrary to public policy, the whole promise fails." Citing: *Pickering vs. Ilfracombe R. Co.*, L. R. 3. C. P. 235, 250; *Harrington vs. Victoria Graving Dock Co.*, L. R. 3 Q. B. Div. 549; *Woodruff vs. Hinman*, 11 Vt. 592, 34 Am. Dec. 712; *Clark vs. Ricker*, 14 N. H. 44; *McMullen vs. Hoffman*, 174 U. S. 639, 43 L. ed. 1117, 19 Sup. Ct. Rep. 839; *Bishop vs. Palmer*, 146 Mass. 469, 474, 4 Am. St. Rep. 339, 16 N. E. 299.

And upon the validity of the consideration which was alleged in the bill, to have been in part

“services rendered both before and after the making of said contract, by the plaintiff in bringing the property to the attention of the committees of Congress as a suitable and appropriate site for a hall of records,” Mr. Justice Holmes said:

“The promise to convey did not become binding until the services were rendered, and, when rendered, according to the allegations of the bill, they were legitimate. We assume that they were legitimate, but the validity of the contract depends on the nature of the original offer, and, whatever their form, the tendency of such offers is the same. The objection to them rests in their tendency, not in what was done in the particular case. Therefore a court will not be governed by the technical argument that when the offer became binding, it was cut down to what was done, and was harmless. The court will not inquire what was done. If that should be improper, it probably would be hidden and would not appear. In its inception, the offer, however intended, necessarily invited and tended to induce improper solicitations, and it intensified the inducement by the contingency of the reward. *Marshall vs. Baltimore & O. R. R. Co.*, 16 How. 314, 335, 336.

The general principle was laid down broadly in *Providence Tool Co. vs. Norris*, 2 Wall. 45, 54, that an agreement for compensation to procure a contract from the Government to furnish its supplies could not be enforced, irrespective of the question whether improper means were contemplated or used for procuring it. *McMullen vs. Hoffman*, 174 U. S. 639, 648.”

The case at bar cannot be distinguished from *Providence Tool Co. vs. Norris*, *Supra*. In that case, to use the language of the Supreme Court, “the

contract was procured through the exertions of Norris, the plaintiff in the court below," while in the case at bar, to use the language of the plaintiff, Chilberg, in his complaint, the contract was obtained "*through the efforts of the plaintiff and without any aid or assistance from said defendant.*"

Revised Statutes, Sec. 3949, provides that "All contracts for carrying the mail shall be in the name of the United States and shall be awarded to the lowest bidder * * *."

Such being the case, what lawful influence could Chilberg have exercised which could have been the sole cause of the contract having been awarded to Hegness, and in return for which Chilberg was to receive eighty-five per cent of the profits of the contract? The conclusion is inevitable that such effort and influence on the part of Chilberg must have been something which both law and public policy condemn.

Providence Tool Co. vs. Norris, Supra, has also been cited and quoted from by this court in *Washington Irrigation Co. vs. Krutz*, 119 Fed. 279, 283, where, in speaking of a contract similar in principle to the one at bar, Hawley, J., said:

"It is the duty of courts to carefully scrutinize contracts of this general character, and to condemn the very appearance of evil, as the tendency of such contracts is to lead to the encouragement of wrong-

doing. Hence the relief asked for in such cases should not be granted. This result follows 'without reference to the question whether improper means are contemplated or used in their execution. The law looks to the general tendency of such agreements, and it closes the door to temptation by refusing them recognition in any of the courts of the country.' *Tool Co. vs. Norris*, 2 Wall. 45, 56; *Trist vs. Child*, 21 Wall. 441, 452; *Mcquire vs. Corwine*, 101 U. S. 108, 111; *Oscanyan vs. Arms Co.*, 103 U. S. 261, 275."

In *Weed vs. Black*, 2 McArthur 268, 29 Am. Rep. 618, the court said of such a contract as we are considering:

"If the terms of the contract be broad enough to cover services of any kind, whether secret or open, honest or dishonest, the law pronounces a ban upon the paper itself."

Additional authorities to the same effect are:

Woodstock Iron Co. vs. Richmond, etc. Co.,
129 U. S. 643, 658, 661.

Sussman vs. Porter, 137 Fed. 161.

Sheppy vs. Stercus, 177 Fed. 491.

Bestor vs. Wathren, 60 Ill. 138.

Crichfield vs. Bermudez Asphalt Pav. Co.,
174 Ill. 433, 51 N. E. 552, 556.

Richardson vs. Crandall, 48 N. Y. 348, 362.

Veary vs. Allen, 173 N. Y. 359, 371, 66 N. E.
103, 106.

Gill vs. Williams, 12 La. Ann. 219, 68 Am.
Dec. 767.

Clippinger vs. Hepbaugh, 5 Watts & S. 315,
40 Am. Rep. 618.

Spalding vs. Ewing, 24 N. E. (Pa.) 219, 220.

Houlton vs. Dunn, 60 Minn. 26, 61 N. W. 898,
30 L. R. A. 737, 51 Am. St. Rep. 493.

Coquillard's Adm'r. vs. Bearss, 21 Ind. 482,
83 Am. Dec. 362.
Foltz vs. Cogswell, 86 Cal. 542, 25 Pac. 60.

III.

THE CONTRACT SUED ON IS VOID UNDER AND BY
VIRTUE OF THE PROVISIONS OF SECTION 3963 OF
THE REVISED STATUTES OF THE UNITED STATES.

Section 3963 of the Revised Statutes of the
United States reads as follows:

“No contractor for transporting the mails within or between the United States and any foreign country shall assign or transfer his contract, and all such assignments or transfers shall be null and void.”

This section is not mentioned in the opinion of the court below and is very different in its language and legal effect from Sections 3477 and 3737, Revised Statutes of the United States, which the court below considered in its opinion.

Section 3737 refers to all contracts with the United States, while Section 3963 refers to contracts for transporting the mails only. Said Section 3737 reads as follows:

“No contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States are concerned. All rights of action, however, for any breach of such contract, by the contracting parties, are reserved to the United States.”

Section 3737 has been construed, both by the Supreme Court and the Circuit Court of Appeals, to be only for the protection of the Government, and it does not make an assignment of a Government contract void as between the transferrer and transferee.

Burck vs. Taylor, 152 U. S. 634, 14 Sup. Ct. 696.

Dulaney vs. Scudder, 94 Fed. 6, 10.

In *Dulaney vs. Scudder* it was pointed out by the Circuit Court of Appeals for the Fifth Circuit, that by Section 3737 transfers are not “declared null and void” but that the statute causes the “annulment of the contract * * * so transferred so far as the United States are concerned.” The court then quotes from *Burck vs. Taylor*, 152 U. S. 634, 14 Sup. Ct. 696, commenting on Section 3737 as follows:

“The express declaration that, so far as the United States are concerned, a transfer shall work an annulment of the contract, carries, by clear implication, the declaration that it shall have no such effect as between the contractor and his transferee. In other words, as to them the transfer is like any other transfer of property, and controlled by the same rules. Its invalidity is only so far as the Government is concerned, and it alone can raise any question of the violation of the statute. The government, in effect, by this section, said to every contractor, ‘You may deal with your contract as you please, and as you may deal with any other property belonging to you, but, so far as we are concerned,

you, and you only, will be recognized either in the execution of the contract or in the payment of the consideration.' ”

Section 3963 of the Revised Statutes, however, by express language, does make all assignments or transfers of contracts for transportation of the mails “*null and void*,” and under the reasoning of the two decisions last quoted, all such assignments and transfers must be held null and void for all purposes.

Apt authority for this contention is not wanting.

Nix vs. Bell, 66 Ga. 664.

This case is on all fours with the case at bar and is thus stated:

“Nix brought suit against Bell, alleging in brief as follows:

On the 1st day of July, 1876, Bell being accepted contractor of the Post Office Department for carrying the mails of the United States from Cleveland, in White County, to Gainesville, in Hall County, it was contracted and agreed between the parties that if Nix would furnish one horse and do the driving, and pay half the expenses at Gainesville, and half the tolls for crossing the Chattahoochee river, that Bell would furnish one horse and the vehicle, and pay the other half of the expenses, etc., and then the ‘parties are to divide equally and to receive equally all the moneys received from the United States Government, and all moneys received from passengers and on freight or baggage,’ etc. The amount received from the United States and also the amount received from passengers, etc., was

set forth, but is not material to the point made. It was also alleged that the plaintiff discharged his part of the contract, and did the service until October 28th, 1877, when he was ousted by the defendant. The defendant received all the moneys from the United States and from passengers, etc., and refused to pay the plaintiff any part thereof. It was alleged that this contract was made in parol, but was afterwards reduced to writing.

Defendant demurred to the declaration, the demurrer was sustained and plaintiff excepted."

Upon this state of facts, the Supreme Court of Georgia delivered the following opinion:

"We cannot see that the court below erred in the point decided. The contract, which is sought to be enforced, appears to be illegal under the laws of the United States and the post office regulations made under those laws.

See Revised Statutes, U. S., 3737, 3709, 3963; Post Office Reg., 1877, p. 146; Adver. for contr., P. M. Gen'l., of 1876, p. 51.

The contract on which the suit depends being illegal, no court can enforce it.

Judgment affirmed."

The use of the words "all such assignments or transfers shall be null and void" in Section 3963, means that such assignments shall be null and void for all purposes.

Spofford vs. Kirk, 97 U. S. 484, 488, 490.

National Bank of Commerce vs. Downie, 218

U. S. 345, 31 Sup. Ct. Rep. 89.

In *Spofford vs. Kirk*, just cited, the Supreme Court said of an assignment of a claim against the United States made null and void by Section 3477

of the Revised Statutes:

“We cannot say, when the statute declares all transfers and assignments of the whole of a claim, or any part or interest therein, and all orders, powers of attorney, or other authority for receiving payment of the claim, or any part thereof, shall be absolutely null and void, that they are only partially null and void, that they are valid and effective as between the parties thereto, and only invalid when set up against the Government.”

That the contract sued on in the case at bar constitutes an assignment of the contract with the Government can not be questioned. By virtue of the contract, Chilberg, the plaintiff below, claims now to be the owner of eighty-five per cent of said contract which was executed by the Government to Hegness. No particular form of words is necessary to constitute a valid assignment. Any act showing the intention of the parties to accomplish this purpose is sufficient.

Macklin vs. Kinealy, 41 S. W. (Mo.), 893, 895.

2 *Am. & Eng. Ency. of Law* (2nd Ed.), 1055.

To show the general policy of the Government to make all contracts for carrying the mail unassignable, reference may be had also to Section 1422 of the postal regulations, which provides, among other things, that “no transfer or assignment shall be made of a bid or any interest therein.”

Postal Laws and Regulations (Ed. of 1913),

p. 644.

IV.

THE CONTRACT SUE ON IS VOID UNDER THE PROVISIONS OF SECTION 3477, REVISED STATUTES OF THE UNITED STATES, PROHIBITING ASSIGNMENTS AND TRANSFERS OF ANY CLAIM UPON THE UNITED STATES, OR ANY PART OR SHARE THEREOF OR ANY INTEREST THEREIN.

This section reads as follows:

“All transfers or assignments of any claim made upon the United States, or any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments and powers of attorney must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same.”

This section has been before the Supreme Court of the United States many times, and has been declared to render void every form of voluntary

assignment, both legal and equitable.

Spofford vs. Kirk, 97 U. S. 484, 24 L. ed. 1032.

United States vs. Gillis, 95 U. S. 407, 24 L. ed. 503.

Erwin vs. United States, 97 U. S. 392, 24 L. ed. 1065.

Goodman vs. Niblack, 102 U. S. 556, 26 L. ed. 229.

Ball vs. Halsell, 161 U. S. 72, 40 L. ed. 622, 16 Sup. Ct. Rep. 554.

St. Paul & D. R. Co. vs. United States, 112 U. S. 733, 28 L. ed. 861, 5 Sup. Ct. Rep. 366.

In *National Bank vs. Downie*, 218 U. S. 345, 31 Sup. Ct. Rep. 89, Mr. Justice Harlan said:

“The intention of Congress must be discovered in the act itself. * * * We cannot say, when the statute declares all transfers and assignments of the whole of a claim, or any part or interest therein, and all orders, powers of attorney, or other authority for receiving payment of any claim, or any part thereof, shall be absolutely null and void, that they are only partially null and void, that they are valid and effective as between the parties thereto, and only invalid when set up against the Government.”

In view of this language the only question to consider is whether the agreement sued on in the case at bar constitutes an assignment of or an agreement to assign a claim against the United States. That it does, we think plain. The agreement purports to make Chilberg the owner of an eighty-five per cent interest in the mail contract itself, and then specifically provides “that all warrants issued and

delivered by the Government in payment under the said contract or contracts shall be signed by the party of the second part and delivered to the party of the first part." (Tr. p. 4.)

The case of *Hobbs vs. McLean*, 117 U. S. 567, 6 Sup. Ct. Rep. 870, is relied upon by appellee but is not in point. The court there held that the formation of a partnership to carry into execution a government contract did not violate Section 3477 Revised Statutes. In the case of *Hobbs vs. McLean*, the contract between the parties was that they would form a partnership to perform a contract with the United States and would divide the profits after the money was collected from the Government. The suit was not brought until after the money was collected in full from the Government. In the case at bar the contract was formed for the purpose of obtaining the contract from the Government in the name of Hegness, and the effect of the contract was to transfer eighty-five per cent interest therein to Chilberg. And it contains a distinct and positive agreement on the part of Hegness to transfer all of the warrants, when he obtains them, to, Chilberg. An agreement to do something which the law forbids is just as void and illegal as the act itself.

In *Hobbs vs. McLean*, *Supra*, it was distinctly held that the action could not be maintained until

the money was actually paid over by the Government and received by the contractor. The court says, on this point:

“This suit is for the recovery, as assets of a partnership, of the money collected on the contract between Peck and the United States and its distribution among the partners on a settlement of the partnership affairs. If Peck had lived and had not been adjudicated bankrupt, the plaintiffs could not have maintained this suit against him until the money which is the subject of this controversy had been collected from the United States. They had no right under this contract with Peck to demand their share of the money until the money had come to his hands. The bankruptcy and death of Peck did not change the terms of the contract. They could not sue his assignee for a distribution of the fund until the fund had been received.”

In the case at bar, the warrant which the court ordered turned over to the receiver was issued July 29th, 1914 (Tr. p. 31), while the suit was commenced July 3rd, 1914 (Tr. p. 9).

In conclusion, we may say that the question whether the contract sued on violates Section 3477 of the Revised Statutes is entirely independent of the proposition that it violates and is void under Section 3963 thereof, and both of said propositions are independent of the reasons why said contract should be held void set forth in the first two subdivisions of our argument. As the contract on which the suit is founded is void, it follows that no action

or suit whatever can be founded on it.

McMullen vs. Hoffman, 174 U. S. 639, 19 Sup.

Ct. Rep. 839, 845, and cases cited.

Although these appeals are taken from interlocutory orders, nevertheless as the contract sued on is void, and cannot sustain plaintiff's claim under any circumstances, the court should, in reversing said orders, direct the court below to dismiss the action on the merits.

Tornanses vs. Melsing, 109 Fed. 710.

Respectfully submitted,

G. J. LOMEN

IRA D. ORTON,

THOMAS R. LYONS,

Attorneys for Appellant.

No. 2523

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOHN HEGNESS,

vs.

EUGENE CHILBERG,

Appellant,

Appellee.

BRIEF FOR APPELLEE.

WILLIAM A. GILMORE,

Central Building, Seattle, Washington,

Attorney for Appellee.

Filed this.....day of March, 1915.

FRANK D. MONCKTON, *Clerk.*

By.....Deputy Clerk.



No. 2523

IN THE

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For the Ninth Circuit

JOHN HEGNESS,

Appellant,

vs.

EUGENE CHILBERG,

Appellee.

BRIEF FOR APPELLEE.

Statement of the Case.

Appellant's statement of the case is very ingenious and rather misleading.

The plaintiff and the defendant in August, 1909, at Nome, Alaska, entered into the written agreement set forth in plaintiff's complaint (Tr. page 2).

At that time the defendant, Hegness, hereinafter referred to as the appellant, was living in Nome, the owner of a dog team, sled, and equipment, necessary and ordinarily used in carrying mail over the trails of that country. The plaintiff in the Court below hereinafter referred to as the appellee,

had just retired from the banking business in Nome, and had financial credit both in Nome and Seattle.

The appellant was desirous of entering into an agreement of partnership to obtain the mail contract with the United States in order to get employment during the winter season, which lasts from November until June.

It was contemplated at the time of entering into the agreement that the appellee should leave for Seattle at considerable expense, where it was necessary to go to obtain the necessary bonds required by the United States Government for the mail contracts. The partnership contract was entered into on the twenty-fifth day of August, 1909, at Nome, Alaska, and very shortly thereafter the appellee left for Seattle. The appellant about the same time, or shortly thereafter, at Nome, filled out the required applications and submitted bids for said mail routes mentioned in said contract. The appellee at Seattle arranged the necessary bond required by the Government, and thereafter, in due time, the said contract was let by the postal authorities for a term of four years at sixteen thousand dollars per year, or sixty-four thousand dollars for the term (see Tr. page 4). Under the terms of said mail contract, the United States mail was to be carried between Nome and Unalakleet, Alaska, each winter between November 1st and June 1st, or a period of six calendar months.

There is nothing in the transcript that even intimates, nor was there ever any lobbying or use of

influence, or any effort to stifle or prevent bidding in any manner whatever, done by either the appellee or appellant.

After the contract was obtained in accordance with the terms of the partnership agreement, the appellee advanced certain funds to the appellant to commence carrying the mails under the contract for the Government. He arranged a line of credit with the Pacific Cold Storage Company, a business and financial institution in the town of Nome, Alaska, where the said appellant could obtain all the funds necessary to employ and pay the necessary mail carriers and other expenses.

All of these arrangements were well known to the postal officials (Tr. page 40), and no arrangement, agreement, or understanding was ever had or entered into between the appellant and appellee to keep the knowledge of appellee's interest in the contract from the Government officials.

There is not a scintilla of evidence in the transcript that there was any collusive understanding between Hegness and Chilberg to keep the information from the officials except some inferences in the answer filed after the Court rendered its opinion. At all times during the four years of said contract was the said Chilberg in constant communication with the postal officials, and they knew that the said contract was taken in the name of Hegness for himself and Chilberg.

Appellant and appellee conducted their business during the first two years—1911 and 1912—(see Exhibits A and B, Tr. pages 43 and 44) satisfactorily and without any trouble or complaint on the part of either. At the end of the third year, 1913 (see Exhibit C, Tr. page 45, and Tr. page 11), Hegness appropriated from the partnership funds the sum of eighteen hundred dollars, which, as the evidence shows, Chilberg (who was living in Los Angeles, California) did not learn until late in the winter of 1913, or the spring of 1914. Exhibit D (Tr. page 46) shows the statement for the last year, or 1914, of the contract.

The plaintiff commenced this suit on the third day of July, 1914, filing his complaint, verified by his attorney, together with the affidavit of his attorney, as the appellant was then living in Los Angeles, and the suit was commenced at Nome.

On the sixteenth day of July, the defendant filed his affidavit (Tr. page 14) claiming that the contract set out in the complaint was void on its face, and defending against the injunction for the warrants for the excess mail, and on the same day filed a general demurrer to the complaint (Tr. page 13). After argument the case was submitted to the Court on the defendant's demurrer to the plaintiff's complaint and plaintiff's motion for an injunction *pendente lite*, and thereafter, on the twelfth day of September, 1914, the Court entered and filed its written opinion (Tr. page 56) overruling the demurrer and granting the injunction *pendente lite*.

Thereafter on September 15, 1914 (Tr. page 28), the defendant filed his answer to plaintiff's complaint, together with an affidavit and a motion to vacate the injunctional order, or to at least modify the same (Tr. page 33). Counter affidavits were filed by the attorney for appellant, together with a reply to defendant's answer, which has been inadvertently omitted from the transcript, and also a motion for a receiver. After argument on the law, the Court entered its two certain written orders appealed from by the appellee (Tr. pages 52 and 53).

Specifications of Error.

Briefly stated, the appellant makes the same assignments of error on the appeals from both orders, to wit: That the Court erred in entering said orders for the reason that the complaint does not state facts sufficient to constitute a cause of action, and that the contract upon which this suit is based is void on its face, and is contrary to the statutes of the United States, and void, and contrary to the regulations of the Post Office Department of the United States, and, consequently against public policy and void, and also that the suit was prematurely brought by the plaintiff (Tr. pages 8, 9, and 10).

The Court will notice by reading the specifications of error that appellant relies solely, so far as this appeal is concerned, on his attack upon the

contract itself, abandoning all facts set up by an affidavit or answer. In other words, the appellant by his assignments of error has asked this Court to determine from the four corners of the contract itself, regardless of everything else in the transcript, whether the said contract is void and against public policy or not. So that if this Court decides that the contract is not illegal or against public policy, it naturally follows that the appellant has abandoned or waived his right under his assignments to complain that the plaintiff was not entitled to have granted both of said orders. In other words if the contract is legal and not against public policy it is conceded we are entitled to the relief granted by both orders.

Argument.

In order to fully grasp and understand the line of distinction between the cases cited by appellant in his brief, and relied upon by him, and the line of cases relied upon by appellee, we deem it expedient at this time to first discuss the facts disclosed in the record, and particularly the terms of the contract in dispute. Owing to the fact that the appellee was absent from Alaska and living in Los Angeles, it was impossible to obtain his version of the facts by affidavit, and in this action the appellee was compelled to rely upon the agreement and the showing made by his counsel from exhibits.

Of course, if the case is tried on its merits, the appellee will have an opportunity to testify in detail on any disputed question pertaining to the securing or carrying out of said contract, but enough appears from the contract and the affidavits in the transcript to show the Court that at the time the said agreement between appellant and appellee was entered into, the appellant had no financial standing, and had no assets other than a physical training and equipment, together with his dog team, and his personal ambition to have a winter season's employment at a good salary.

A casual glance at the financial exhibits in the transcript, A, B, C, and D (Tr. pages 43-46), will show to the Court that Hegness received for his work each winter from November first to June first, a period of six months, a princely salary greater than that received by most bank presidents. In 1911, the first year, he received thirty-six hundred dollars wages, four hundred dollars for extra team hire, six hundred dollars and sixty-five cents for his fifteen per cent of the profits, and subsequently placed his hand in the partnership pocket and extracted twenty-four hundred dollars more, or six hundred dollars per year. In the second winter, 1912, he received practically the same sums. In the third winter, his salary and expenses were all raised by himself, having a luxury of twenty-seven dollars for Christmas cigars. In the fourth and final year, his expense account was padded to such an extent that there was practically no profit left

(Tr. page 41). The appellant in his brief complains of the lack of equity in the division of the profits of the contract, fifteen per cent to appellant and eighty-five per cent to appellee.

The appellee put up the expenses of his own trip from Nome to Seattle in the fall of 1909, where he went specially to arrange to give the necessary bonds that could not be obtained in the town of Nome, Alaska, and in addition thereto, obtained through the aid of his influential friends in Seattle a line of credit with the Pacific Cold Storage Company by guaranteeing the payment of any moneys advanced to the partnership during the four years. This line of credit was so arranged that Hegness could go to the Pacific Cold Storage Company at any time and obtain any amount of money needed or necessary in the business.

A glance at Exhibit D (Tr. page 46) will show the Court how extensive and agreeable a financial arrangement had been made through the financial standing of the appellee.

Chilberg was financially liable for every act performed by Hegness. He and his endorsers to the Cold Storage Company have had to make good, since the suit was instituted, the balance of the expense account for the last year. Instead of the contract being inequitable, the way the operations were conducted by Hegness, particularly in the last year, Chilberg had far the greater risk of loss. Hegness had a good winter's job in a land where profitable employment was very scarce.

The question of whether or not the contract was or was not equitable certainly cannot be raised on this appeal without all of the facts being properly before the Court.

In construing the contract (Tr. page 2) which this Court is now called upon to say, by reason of its plain language is or is not against public policy and void, we ask the Court first to consider the language of the contract before applying the law. The parties to the contract expressed their intentions very clearly before stating in the contract the terms and covenants each was to keep and perform. The intention of the parties is expressed in the contract in the following language:

“The parties * * * are desirous of securing a mail contract to carry the United States mail from Nome to Unalakleet * * * are desirous of bidding upon proposals * * * in the name of the party of the second part.”

The Court will notice here that there was no intent expressed or otherwise on the part of either appellant or appellee that the appellant Hegness was not to disclose to the post office officials in his bid that Chilberg was to be interested in the mail contract with him; simply that they were to bid and take the contract in the name of Hegness. Their further intent is expressed in the following language:

“The parties are desirous of forming a co-partnership for the purpose of operating the said mail routes, or either of them, should the said contracts be obtained.”

Nowhere in the contract is there the slightest intimation that there was any collusion or collusive attempt, secret or otherwise, to prevent or stifle bidding or to assign the mail contract. There is nothing in the transcript, in the affidavits, or exhibits that shows in the slightest particular that there was ever a thought or intent on the part of either the appellant or appellee to secretly or collusively mislead the post office officials.

When this case is tried on its merits, the evidence will undoubtedly show the fact that when Hegness filled out his printed application or bid at Nome, after Chilberg left Seattle to obtain the bond, that he inadvertently omitted to state that Chilberg was interested in the bid with him. It does appear, however, in the transcript, and is before the Court at this time that the post office officials at all times knew of Chilberg's interests and recognized him as being interested in the contract.

Counsel for appellant in his brief dwells at length upon the language and expression in the contract as follows (Tr. page 2):

“That each of the parties hereto shall endeavor so far as he can to obtain the said contracts above-mentioned, or either of them, and to that end, the party of the first part agrees to advance all necessary funds needed for said purpose.”

This question is raised by appellant in his brief by innuendo and insinuation that Chilberg had in

some mysterious manner or way unduly influenced some official or had expended or intended to expend money unlawfully and illegally to obtain the said contract. No such issue was made before the trial Court nor is there one iota of proof in the transcript upon which to base such an insinuation or such a meaning to the language used in the contract. Had such an issue been raised at the injunction hearing, we certainly would have procured the affidavit of Chilberg to show what funds were indeed expended or intended to be expended at the time the agreement was drawn up; but it does appear in the transcript that Chilberg at great expense to himself under the terms of the contract, immediately departed for Seattle, where he arranged for the bond required for bidders paying or advancing \$1200 for a bond.

We further call the Court's attention to the financial exhibits and statements in the record (Tr. pages 43-47) wherein every item of expense is given, and there is not the slightest suggestion in any of the items, that any funds were ever used or intended to be used, corruptly or otherwise, than as legitimate expenses in obtaining the contract and carrying out its objects.

We call the Court's attention to the fact that this was not an agreement that by its language in any way provided for compensation or payment by Hegness to Chilberg for obtaining or aiding him in obtaining the mail contract, nor has it the slightest resemblance to what is known as a contingent or

lobbying contract. It is plainly stated, and shows on its face to be a bona fide partnership between the two men to furnish the United States Government with a responsible bidder, and this is reinforced by the fact that clearly appears in the transcript that for four years the contract was strictly and carefully carried out between the parties and the United States Government.

The partners adjusted their accounts for the first two years of the partnership through their treasurer, the Pacific Cold Storage Company, and everything was satisfactory until the end of the third year, being the summer of 1913, when appellant violated the fifth covenant of the partnership in refusing to turn over certain postal warrants to the treasurer, the Pacific Cold Storage Company, but instead, cashed them at a local bank in Nome, Alaska, and appropriated therefrom arbitrarily, the sum of twelve dollars and fifty cents per trip for forty-eight trips per year. This, the Court will notice, was not done the first or second year, but at the end of the third year he appropriated eighteen hundred dollars, claiming it as extra compensation. When Chilberg heard of this during the last winter, he immediately took steps to persuade Hegness to carry out his agreement, which ended in a rupture between the partners, and this suit resulted.

This Court is not concerned at this time in any accounting between the partners, but can and must

consider all of these facts in shedding light upon the language and meaning of the contract to be interpreted. We have gone into the facts of this case at this time rather extensively in order to try to show the Court that nearly the whole of appellant's brief on the law is based on a misstatement or fallacious statement of facts.

The appellant in his brief argues the case to the Court under the following topics briefly stated:

1. The contract sued on is against public policy and void because its tendency is to prevent or diminish competition of bids.

2. The contract is a contingent or lobbying contract.

3. The contract is void under the Statutes of the United States, because it assigns the mail contract.

4. The contract sued on is void under the Statutes of the United States, because it assigns a claim upon the United States.

With the foregoing facts before us, let us now consider the fallacy of appellant's position on these four propositions.

We would have no quarrel with counsel on his statements of the law, or his authorities cited, if we would assume as he did a statement of facts not shown in the transcript, or if we read into the contract numerous intents and meanings or language not found therein or ever intended. A mere casual glance at the contract shows that it was not an

agreement to stifle or prevent bidding, and no stretch of the imagination would warrant anyone in calling the contract a contingent or lobbying contract, nor can we understand how counsel could possibly contend seriously to the Court that this agreement between Hegness and Chilberg was an assignment in any sense or manner whatever of any contract or claim against the United States. The contract shows on its face that it was not assigned but that Hegness was to go on the mail route as a carrier and as superintendent in charge of the work and the transcript shows he did do so.

It is a fundamental rule of pleading that a demurrer will only lie for defects which appear upon the face of the pleading to which it is opposed, consequently, it must follow that in construing this contract, if nothing appears in the contract that shows in any manner or way that it is a lobbying contract, an assignment of the mail contract, or that it in any manner or way violates public policy, then the Court should affirm the lower Court.

In searching the contract for defects which appear upon the face which would invalidate it as being against public policy either by stifling bidding or lobbying, or in violation of a public statute as an assignment, the Court should not permit suggested meanings, surmises or insinuations to govern its interpretation.

When a contract is open to two constructions, the one lawful and the other unlawful, the former must be adopted.

Hobbs v. McLean, 117 U. S. 567;

Wharton on Evidence (2nd Ed.), Sec. 1250;

Lorillard v. Clyde, 86 N. Y. 384.

The illegality of a contract sued on must appear upon the face of the complaint.

Encyc. Plead. & Prac., Vol. VI, page 297,
and cases cited under Note 4.

It is undoubtedly the law and not open to argument that a contract against public policy is illegal and cannot be enforced; but our contention is that the contract before this Court is not against public policy and should be enforced. This is where we disagree with counsel for appellant and where his law fails to fit the facts before the Court.

“A contract should not be declared to be in contravention of public policy unless it is apparent that it controverts some public statute, or is against good morals, or that its tendency is to interfere with the public welfare or safety.”

McCowen v. Pew, 21 L. R. A. (New Series)
page 800.

The lower Court in its able opinion in the case at bar aptly stated the rule:

“Every case must be determined from the particular facts involved or upon the facts as presented by the pleadings.”

Given one set of facts certain law is applicable, while in another given set of facts the other rule of law applies. Throughout all the decisions cited by appellant and those hereinafter cited, the Court will readily see that there are two well defined lines of authority, and that the principles involved are clear cut and easily applied to a given statement of fact. If the Court assumes the facts to be as counsel for appellant in their brief assume, then we are willing to admit that appellant's statement of the law that a contract against public policy was illegal would apply, but if the Court adopts our view of the intent and meaning of the contract and the facts as stated herein, then we contend that the rule of law applies that an agreement that one shall bid for several for a public contract is not illegal *per se*.

Appellant in his brief has rested his case on practically two authorities, to wit:

Atcheson v. Mallon, 43 N. Y. 147, and
Hoffman v. McMullen, 83 Fed. 372 (affirmed
 in 174 U. S. 639), and the authorities cited
 and discussed in these two cases.

In all of the cases there is no better authority for the appellee than this same case of *Hoffman v. McMullen*, *supra*, under our contention of the intent and meaning of the contract in dispute and the facts surrounding the same. The two lines of decisions are cited, discussed, and distinguished by the Court in this case, and are so plainly stated that

we are somewhat surprised that the able counsel for appellant would have the temerity to claim this case as an authority under the facts in this record. The case of *Hoffman v. McMullen* was tried on its merits in the Court below, and the evidence disclosed that the parties submitted dummy bids, agreeing in advance of bidding on terms of their submitted bids, and it developed in the evidence that they used all kinds of improper means to defraud the City of Portland as evidenced by the following extract from McMullen's letter to Hoffman:

"I do not want to let go on that submerged pipe; want to get the job. I think we can make \$25,000 on that job, but we must pool it. To do this, we will have to let the secretary, Frank T. Dodge, in, and, if any bids come without personal representatives, have him not receive them until after letting, and then return them unopened; and we will gather in everybody that is personally represented. Don't think there is many."

Judge Hawley, speaking for the court, page 375, says:

"The refusal of courts to enforce such contracts is always founded in general principles of public policy which the defendant may take the advantage of, contrary to the real justice of the case, as between the parties, plaintiff and defendant. It is the duty of all courts to keep their eyes steadily upon the interests of the public, and when they find an action is founded upon a claim injurious to the public, and which has a bad tendency, to give no countenance or assistance to it in *foro civili*."

Again, on page 376, the Court, after properly stating the law that contracts to prevent competition and bidding for public work are contrary to public policy (and citing practically all of the authorities relied upon by appellant in this case) then distinguishes in principle the law applicable to cases where the facts are similar to the case at bar, as follows:

“It is argued by appellee that the bidding was not illegal, because the proof shows that McMullen and Hoffman were jointly interested in the bid, and that the law allows two or more persons to combine together for the purpose of making one bid.

This is true where no fraudulent purpose is involved. An honest co-operation between two or more persons to accomplish an object which neither could gain alone in his individual capacity is not within the rule, although in a certain sense and to a limited degree, such co-operation might have a tendency to lessen competition. There may be a competition that saves, as well as a competition that kills. The amount of work to be performed, the necessity of obtaining means to properly carry on the contract, the responsibility of the parties, their ability to complete the work, etc., are matters which are liable to make it absolutely necessary for rival contractors to combine their forces and unite together, not only to secure the contract, but to enable them, if thus obtained, to complete it without financial embarrassment or other difficulties which are liable to arise in cases of individual responsibility. There is no valid objection to such voluntary combinations, if the joint action of the parties is done honestly and in good faith. In all contracts secured in such a manner, the Courts should never

hesitate to protect parties in their agreements with each other, and compel them to comply with the terms thereof. It is only where the facts and circumstances surrounding the case clearly show that illegal means or improper and deceptive influences and methods were used to procure the contract that the maxim '*in pari delicto*' applies."

Now, we pause to ask the Court, in the light of this clear statement of the law, is there anything in the contract before us, or surrounding the contract showing any fraudulent purpose? Is there anything disclosed that shows that Hegness and Chilberg were not acting honestly and in good faith? Wherein does it show that any illegal means or improper or deceptive influences and methods were used to procure this mail contract? We contend that there is no better authority than this opinion of Judge Hawley, subsequently affirmed by the Supreme Court of the United States.

The law frowns on contracts of the following character:

- (a) An agreement not to bid.
- (b) An agreement to withdraw a bid.
- (c) An agreement for a contingent compensation to obtain a contract on a bid.
- (d) An agreement for a compensation for refraining from bidding.
- (e) An agreement to submit deceptive bids, etc.
- (f) An agreement based on collusive bids.

A careful reading of the authorities cited by appellant in his brief brings each case within one of the foregoing kinds of contracts. They all fall within the same category and come within the principle of law applied to the facts in *Hoffman v. McMullen*, supra. They are all based upon fraud upon the public.

Chilberg and Hegness, by uniting their efforts, had no intention, expressed or otherwise, of preventing open competition, nor did they unite to compel the Government to pay a higher amount for the mail contract, but, as the record shows, they united their efforts in a partnership to secure the contract and to carry it out with the Government, neither alone being able to obtain the contract or carry it out. By the fact that they did unite, the Government was furnished a responsible bidder, which it would not have obtained otherwise.

Judge Hawley, in *Hoffman v. McMullen*, supra, page 380, says:

“The dividing line is always sharply drawn with reference to the particular facts of each case, and the conclusion reached that where the parties have acted openly and honestly, and entered into an agreement, which neither in its purpose, effect nor natural tendency is to prevent a fair competition, it can be and should be enforced, but where there is a secret combination—call it partnership or any other name—the effect of which is, or the natural tendency of which is, to abate honest rivalry or prevent fair competition, it is to be and is condemned, as violative of public policy and held to be absolutely void. All the authorities hold that, where either the intention, the effect, or the

necessary tendency of the combination is to stifle or limit competition, it is contrary to public policy, and, when disclosed, will be stamped with marks of disapproval in any court of law or of equity."

Again, on page 381, Judge Hawley says, in speaking of the validity of the contract:

"Its validity is tested, not by its results, but by its objects, as shown by its terms."

Nowhere in the agreement is any purpose or intent expressed to keep Chilberg's interest in the mail contract secret, nor was there ever any such intention. On the contrary, the record shows that, notwithstanding Hegness's mistake or neglect to state in the application blank required by the postal regulations, the record discloses that the postoffice officials at all times were aware of Chilberg's interest, and that there was no deception or fraud of any character.

A careful reading of *Atcheson v. Mallon*, supra, so thoroughly relied upon by appellant, places it within the general class of cases to prevent competitive bids. In its effect it was quite like *Hoffman v. McMullen*. As remarked by Mr. Justice Peckham, of the Supreme Court, affirming *Hoffman v. McMullen*, as follows, in referring to *Atcheson v. Mallon*:

"Which in its nature is a case very similar to the one now before us",

and again in the same case referring to that character of cases, says:

“The vice is inherent in contracts of this kind, and its existence does not in the least depend upon the success which attends the execution of any particular agreement.”

The cases of

Gulick v. Ward, 10 N. J. Law, 87;

Atcheson v. Mallon, *supra*;

Hunter v. Pfeiffer, 9 N. E. 124;

King v. Winants, 71 N. C. 469,

and others cited and relied on by appellant, have no application whatever to the facts in this record, and are not authority or in point in any way whatever under the view that we take, but only aid the Court in distinguishing the difference between such cases under the facts in each case from the principle enunciated by Judge Hawley applicable to the facts similar to the case at bar.

The case of *Atcheson v. Mallon* was based upon the authority of *Gulick v. Ward*, *supra*. The New York Court subsequently, in *Marsh v. Russell*, 66 N. Y. 288, by Mr. Justice Earl, distinguishes the two lines of cases and reviews the principles enunciated in *Gulick v. Ward*, *supra*, and *Atcheson v. Mallon*, *supra*, and other similar cases, and clearly distinguishes and approves as the true rule the principles enunciated in *Phippen v. Stickney*, 3 Met. 384, quoting the language of Mr. Justice Dewey as follows:

“When such an agreement is made for the purpose and with a view of preventing fair competition, and by reason of want of bidders to depress the price of the article offered for

sale below the fair market value, it will be illegal and may be avoided as between the parties as a fraud upon the rights of the vendor. But, on the other hand, if the arrangement is entered into for no such fraudulent purpose, but for the mutual convenience of the parties and for a reasonable and honest purpose, such agreement will be valid and binding."

In this case the New York Court quite clearly distinguishes the case of *Atcheson v. Mallon*, and quite clearly reconciles that case with the doctrine enunciated in *Breslin v. Brown*, 15 Am. Rep. 627.

Appellant cites Cyc. as an authority. So do we. See 9th Cyc., page 492, note 81, where Cyc. clearly distinguishes the rule:

"On familiar principles, an agreement that one shall bid for several for a public contract is not illegal *per se*", citing

Bellows v. Russell, 51 Am. Dec. 238;

Breslin v. Brown, *supra*;

Flanders v. Wood, 18 S. W. 572, and other cases.

Again Cyc. says:

"And generally an honest co-operation between two or more persons to accomplish an object which neither could gain if acting alone in his individual capacity is not within the rule, although in a certain sense, and to a limited degree, such co-operation might have a tendency to lessen competition."

Gibbs v. Smith, 115 Mass. 592;

Lawnin v. Bradley, 13 Mo. App. 361;

Cocks v. Izard, 7 Wallace, 559;

Hoffman v. McMullen, *supra*;

In *Gibbs v. Smith*, supra, the Court, in drawing the line of decisions in an analogous case, said:

“An agreement between two or more persons that one shall bid for the benefit of all upon property about to be sold at public auction, which they desire to purchase together, either because they propose to hold it together, or afterwards to divide it into such parts as they wish individually to hold, neither desiring the whole, or for any similar honest or reasonable purpose, is legal in its character and will be enforced; but such agreement, if made for the purpose of preventing competition and reducing the price of the property to be sold below its fair value, is against public policy, and in fraud of the just rights of the parties offering it, and, therefore, illegal.”

Citing also

Lawnin v. Bradley, supra, and

Cocks v. Izard, supra.

Counsel for appellant contends that the lower Court fell into error in applying the principles of *Breslin v. Brown* to the facts of this case, and says, “*Breslin v. Brown* cannot be considered as an authority.”

Well, again we call the Court’s attention to the language of Judge Hawley in *Hoffman v. McMullen* at page 380, in distinguishing and announcing how far *Breslin v. Brown* can be relied upon as authority:

“*Breslin v. Brown* * * * is perhaps the strongest case presented in favor of appellee herein as to the right of parties who had intended to bid, and did bid, upon public improve-

ments, that were to be let to the lowest bidder, to enter into an agreement, to become partners in the work in the event that the contract should be awarded to either and that the contract, when awarded should inure to the benefit of the firm. But that case, in its facts, is clearly distinguishable from the case at bar in many of its essential particulars. There, separate and independent bids were filed by the respective parties.

‘The bid of each was based upon his own judgment and filed at his own discretion.’

It did not appear that either had knowledge of the other’s bid, and these facts led the Court to the conclusion that the agreement made between the parties, and the result of the bidding, did not have a tendency to stifle competition at the letting of the bid.”

In other words, if we understand Judge Hawley correctly, he says in effect that *Breslin v. Brown* was correctly decided as applied to the facts in that case, just as *Breslin v. Brown* is good authority for the facts of the case at bar.

The facts in the case of *Hunter v. Pfeiffer*, supra, were entirely different from the facts now before this Court. The Court in *Hunter v. Pfeiffer*, under the set of facts which clearly showed the agreement was made to stifle bidding, reaffirmed the doctrine of *Atcheson v. Mallon*, and kindred decisions applicable to such set of facts. The Court there saying:

“The purpose, tendency and necessary effect of such a contract was to stifle fair, open, actual competition, and to perpetrate a fraud upon the public officers.”

The case of *Bellows v. Russell*, supra, was a mail contract case and very similar and on all fours with the facts of the case at bar. The contract is set out with the additional facts given that the parties met, and learning that each intended to bid, and had made some preparation, entered into their contract. The Court distinguishes the two lines of authorities so far as then adjudicated, reaffirming the principles of *Doolin v. Ward*, 6 Johns. 194, and *Wilbur v. Howe*, 8 Johns. 444, and then cites and quotes with approval Mr. Justice Dewey in *Phippen v. Stickney*, supra, holding that under the facts the contract was not illegal or against public policy. The Court reasoned the same as the New York Court in *Marsh v. Russell*, supra, wherein Mr. Justice Earl reviewed *Gulick v. Ward* and *Atcheson v. Mallon* relied upon by appellant herein.

In *Breslin v. Brown*, supra, the Court, after admitting the rule to be that any agreement entered into for the purpose of preventing or stifling competition is against public policy, refers to the case of *Atcheson v. Mallon* and distinguishes the rule of the exception by quoting from *Phippen v. Stickney*, supra, as follows:

“The extent to which the doctrine of invalidating such contracts can safely be carried would rather seem to include within the rule all cases of fraudulent acts and combinations having for their object to stifle fair competition at biddings, with the design of becoming the purchasers at a price less than the fair value

of the property. Beyond this, the application of the principle contended for may be found productive of mischief, and an unwarranted interference with the course of business at auction sales."

The lower Court in the case at bar in its able and instructive opinion (Tr. page 61) in commenting on the contract in dispute in this action made the following finding of fact:

"The contract here shows on its face nothing more or less than an agreement that the parties shall endeavor to obtain a contract for carrying the mail in Alaska, and that they shall divide the net profits upon an agreed percentage basis, after the objects of the contract are completed, and after the money due on same is paid by the United States. There is no suggestion of a purpose to lessen the bids, nor is that the effect or tendency of the contract."

We repeat that we are unable to see how this Court could come to any other finding from reading the contract than that arrived at by the lower Court as above expressed. Quite a number of the cases cited by counsel in his brief are ably distinguished in the opinion of the lower Court, and it would be useless for us to attempt to further discuss them other than to call this Court's attention and express the hope that this Court will read the opinion of the lower Court with the same interest that we did.

Among the cases discussed and distinguished are the following:

King v. Winants, 17 Am. Rep., page 11;
Tool Co. v. Norris, 2 Wallace 45;

Meguire v. Corwine, 101 U. S. 108;
McConaghy v. Clark, 77 Pac. 1084;
Marshall v. B. & O. R. R., 14 Howard 314;
Trist v. Child, 21 Wallace 441;
Hobbs v. MacLean, 117 U. S. 567;
Northern Pacific Lumber Co. v. Spore, 75
 Pac. 890;
Dulaney v. Scudder, 94 Fed. 6.

Counsel for appellant offers about ten pages of argument and endeavors in his brief to convince the Court that the contract in dispute was a lobbying contract. The ridiculous observation is made that because Chilberg was to receive eighty-five per cent of the net profits, that the Court should assume that Chilberg was to spend a portion of this percentage in lobbying the contract from the postal authorities. The question of whether or not the agreement was inequitable in its division of profits can only come before the Court on an accounting and can only come up for consideration and determination when the case is heard on its merits.

Feather v. Palm Bros., 133 Fed. 466;
Fleming v. Lee, 109 Fed. 953;
Meehan v. Valentine, 145 U. S. 611.

See also extensive and elaborate note of

Cudahy Packing Co. v. Hybon, 18 L. R. A.
 981.

Referring to sections of Revised Statutes cited by appellant, the Court in *Hobbs v. McLean*, *supra* (page 576), says:

“They were passed in order that the Government might not be harassed by multiplying the numbers of persons with whom it had to deal, and might always know with whom it was dealing until the contract was completed and a settlement made. Their purpose was not to dictate to the contractor what he should do with the money received on his contract after the contract had been performed.”

See also

U. S. v. Gillis, 95 U. S. 407;

Erwin v. U. S., 97 U. S. 392;

Goodman v. Niblack, 102 U. S. 556;

St. Paul & D. R. Co. v. U. S., 112 U. S. 733.

It is certainly asking the Court to go a long way to infer and guess how Chilberg intended to spend his share of the profits of the contract, in view of the fact that there is nothing in the agreement that intimates that anything fraudulent was to be done with the money.

We cite the Court to the note to *Houlton v. Dunn*, 30 L. R. A. 737, wherein the rule applicable to contracts known as contingent or lobbying contracts is clearly expressed.

It seems to us like a waste of time and labor to discuss or ask the Court to consider appellant's contention that this agreement was an assignment of the contract, or an assignment of a claim against the United States, and, therefore, in violation of the Revised Statutes prohibiting assignments; but on this point we ask the Court to consider the case of *Hobbs v. McLean*, *supra*.

There is absolutely no similarity of facts in the case at bar with the case of *Spofford v. Kirk*, 97 U. S. 484, and the other cases relied upon by appellant.

See also

Northern Pacific Lumber Co. v. Spore, supra;
Dulaney v. Scudder, supra.

In conclusion we submit the contract is a partnership *inter sese* entered into for the following purposes:

- (a) To obtain the mail contract;
- (b) To provide the means of performing it;
- (c) To divide the net profits after the Government has paid over the money.

With this interpretation of the contract, we submit the Court should affirm the orders of the lower Court in enjoining the appellant from dissipating the partnership funds pending the final hearing of the case on its merits.

The conduct of the appellant in appropriating from the partnership funds the sum of twenty-four hundred dollars and refusing to apply the postal warrants to the indebtedness of the partnership certainly demands the equitable interposition of the Court and the injunctive order as well as the receivership were both necessary and proper.

See

High on Receivers, page 492, Section 760
 et seq.

We submit in conclusion the Court should affirm the orders of the lower Court and allow the cause to be tried on its merits.

Respectfully submitted,

WILLIAM A. GILMORE,

Attorney for Appellee.

United States
Circuit Court of Appeals
For the Ninth Circuit.

PHOENIX SECURITIES COMPANY, a Corporation,

Plaintiff in Error,

vs.

M. E. DITTMAR,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the Northern District of California,
Second Division.

Filed

JAN 14 1915

F. D. Monckton,
Clerk.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the Circuit Court of the United States, in and
for the Ninth Circuit, Northern District of
California.*

Action No. 14,982.

M. E. DITTMAR,

Plaintiff,

vs.

PHOENIX SECURITIES COMPANY, a Corpora-
tion,

Defendant.

Fourth Amended Complaint.

Now comes plaintiff above named, and with leave of Court first had and obtained, files this his fourth amended complaint in the above-entitled matter, and for cause of action against said defendant alleges:

I.

That at all the times herein mentioned defendant Phoenix Securities Company was, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of Maine, with its principal place of business at the City of New York, State of New York.

II.

That some time prior to the first day of May, 1907, defendant, who was then the owner of all that certain group of mines known as the Summit Consolidated Group of Mines, the Graves Consolidated Group of Mines, and the North Mammoth Extension Group of Mines, all situate, lying and being

in Sections 20 and 30, Township 34 North, Range 5 West, M. D. M., in the County of Shasta, State of California, and generally known as the Summit and Graves property, made and entered into an agreement with plaintiff by the terms of which said agreement defendant did authorize plaintiff to find a purchaser for the aforesaid group of mines; and [1*] defendant did further agree that if and when plaintiff should find a purchaser for the aforesaid group of mines who should be ready, willing and able to purchase the aforesaid group of mines for the sum of not less than Seventy-five Thousand (\$75,000.00) Dollars net to defendant, and payable upon such terms as might be agreeable and satisfactory to defendant, that defendant would, upon the completion and consummation of such sale, pay to plaintiff on account of the services of plaintiff in furnishing such purchaser to defendant such sum of money in excess of said sum of Seventy-five Thousand (\$75,000.00) Dollars as said group of mines might be sold by defendant to such purchaser so furnished by plaintiff.

III.

That pursuant to the aforesaid authorization and agreement and in performance thereof, plaintiff did undertake to find a purchaser for the aforesaid group of mines, and on or about the first day of May, 1907, plaintiff did discover a prospective purchaser for said properties and did introduce and bring to defendant, as such purchaser, a certain corporation known as Stauffer Chemical Company,

*Page-number appearing at foot of page of original certified Record.

a person who was then and there willing, able and ready to purchase the aforesaid group of mines from defendant, and did then and there agree to purchase the same and to pay therefor the sum of Eighty-five Thousand (\$85,000.00) Dollars, provided terms of payment of said sum of Eighty-five Thousand (\$85,000.00) Dollars could be arranged satisfactory to defendant and to said Stauffer Chemical Company.

IV.

That subsequently and on or about the 1st day of February, 1908, defendant and said Stauffer Chemical Company did arrange terms of payment of said purchase price of Eighty-five Thousand (\$85,000.00) Dollars satisfactorily to defendant and [2] said Stauffer Chemical Company; and pursuant to said terms of sale and purchase defendant did sell and convey to said Stauffer Chemical Company the aforesaid group of mines; that plaintiff is informed and believes, and on such information and belief alleges that said Stauffer Chemical Company has fully complied with all the terms and conditions of said sale.

V.

That upon the completion and consummation of said sale as hereinabove set forth, there became due and payable to plaintiff the sum of Ten Thousand (\$10,000.00) Dollars; that although frequently thereunto demanded by plaintiff, defendant has failed, neglected and refused, and still fails, neglects and refuses to pay to plaintiff said sum of Ten Thousand (\$10,000.00) Dollars, or any part thereof, and

the whole of said sum of Ten Thousand (\$10,000.00) Dollars is due, owing and unpaid by defendant to plaintiff.

VI.

That plaintiff has duly performed all the conditions and terms required on his part to be performed in and by the terms of the aforesaid authorization and agreement.

And further complaining of defendant, and as and for a second cause of action, plaintiff alleges:

I.

That at all the times herein mentioned defendant Phoenix Securities Company was, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of Maine, with its principal place of business at the City of New York, State of New York.

II.

That some time prior to the first day of May, 1907, defendant, [3] who was then the owner of all that certain group of mines known as the Summit Consolidated Group of Mines, the Graves Consolidated Group of Mines, and the North Mammoth Extension Group of Mines, all situate, lying and being in Sections 20 and 30, Township 34 North, Range 5 West, M. D. M., in the County of Shasta, State of California, and generally known as the Summit and Graves property, made and entered into an agreement with plaintiff, by the terms of which said agreement defendant did authorize plaintiff to find a purchaser for the aforesaid group of mines who would be ready, willing and able

to purchase said group of mines from defendant upon such terms and conditions as might subsequently, by means of negotiations to be had between defendant and such prospective purchaser, be agreed upon between defendant and such prospective purchaser.

III.

That pursuant to the aforesaid authorization and agreement, and in performance thereof plaintiff did, on or about the first day of May, 1907, discover a prospective purchaser for said properties and did introduce and bring to defendant said certain prospective purchaser, to wit, the Stauffer Chemical Company, a corporation, who was then and there a person able, willing and ready to purchase said group of mines, and did then and there agree to purchase the same for the sum of Eighty-five Thousand Dollars (\$85,000.00), provided that the aforesaid group of mines might be purchased by said Stauffer Chemical Company from defendant upon such terms and conditions as might be satisfactory to both said Stauffer Chemical Company and defendant.

IV.

That subsequently and on or about the first day of February, 1908, said Stauffer Chemical Company and defendant did [4] arrange and agree upon the terms and conditions of the sale and purchase of the aforesaid group of mines, and pursuant to said terms of sale and purchase, defendant did sell and convey to said Stauffer Chemical Company the aforesaid group of mines for the agreed price

of Eighty-five Thousand Dollars (\$85,000.00); that plaintiff is informed and believes, and on such information and belief alleges that said Stauffer Chemical Company has fully complied with all the terms and conditions of said sale.

V.

That plaintiff did expend much time, skill and money in and about the work and services rendered to defendant in the securing of said Stauffer Chemical Company as a purchaser for the aforesaid group of mines; that said Stauffer Chemical Company was secured as a purchaser for the aforesaid group of mines solely through the labor, services, skill and expenditures of plaintiff; that the reasonable value of said work, services, skill and expenditures, as hereinabove set forth, is the sum of Ten Thousand (\$10,000.00) Dollars.

VI.

That although frequently thereunto demanded by plaintiff, defendant has failed to pay said sum of Ten Thousand Dollars (\$10,000.00), or any part thereof, and the whole of said sum remains due, owing and unpaid to plaintiff.

VII.

That plaintiff has duly performed all the conditions and terms required on his part to be performed in and by the terms of the aforesaid authorization and agreement.

And further complaining of defendant, and as and for a third cause of action, plaintiff alleges: [5]

I.

That at all the times herein mentioned defendant

Phoenix Securities Company was, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of Maine, with its principal place of business at the City of New York, State of New York.

II.

That some time prior to the first day of May, 1907, defendant made and entered into an agreement with plaintiff, in and by the terms of which said agreement, defendant did authorize plaintiff to find a purchaser for that certain group of mines known as the Summit Consolidated Group of Mines, the Graves Consolidated Group of Mines, and the North Mammoth Extension Group of Mines, all situate, lying and being in Sections 20 and 30, Township 34 North, Range 5 West, M. D. M., in the County of Shasta, State of California, and generally known as the Summit and Graves Property, then owned by defendant, and defendant did further agree that defendant would pay to plaintiff if and when plaintiff should find a purchaser for the aforesaid group of mines who was ready, willing and able to purchase of defendant the aforesaid group of mines, defendant would pay to plaintiff as and for a compensation a commission for the services of plaintiff in finding such purchaser ten (10) per cent of such sum of money as defendant might thereafter actually receive in cash and money on account of the sale to such prospective purchaser of the aforesaid group of mines.

III.

That pursuant to the aforesaid authorization and

agreement and in performance thereof, plaintiff did undertake to find a purchaser for said group of mines, and on or about the first day of May, 1907, plaintiff did discover a prospective purchaser for said [6] properties and did introduce and bring to defendant, as such purchaser, a certain corporation known as Stauffer Chemical Company, a person who was then and there willing, able and ready to purchase the aforesaid group of mines from defendant, and did then and there agree to purchase the same and to pay therefor the sum of Eighty-five Thousand (\$85,000.00) Dollars.

IV.

That subsequently and on or about the first day of February, 1908, defendant did sell and convey to said Stauffer Chemical Company the aforesaid group of mines, and did arrange the terms of payment satisfactorily to defendant as follows: That plaintiff is informed and believes, and on such information and belief alleges that of said sum of Eighty-five Thousand (\$85,000.00) Dollars defendant has received from said Stauffer Chemical Company the sum of Forty Thousand (\$40,000.00) Dollars in cash and money which has been actually paid prior to the date of the filing of this complaint, and the further sum of cash and money as hereinafter set forth; that the balance of Forty-five Thousand (\$45,000.00) Dollars is due and payable out of the smelter returns which are to arise from the working and operation of the aforesaid group of mines, and will be paid in future according to the terms and conditions of that certain instrument,

dated the 5th day of February, 1908, in writing between defendant and the Summit Copper Company, a corporation organized and existing under the laws of the State of Maine, and which said last-named corporation, for and on behalf of said Stauffer Chemical Company, did undertake to pay said balance of Forty-five Thousand (\$45,000.00) Dollars on account of the purchase price of the aforesaid group of mines; that in and by the terms of said last named agreement said Summit Copper Company [7] has agreed to pay to defendant on or after the first day of January, 1908, the sum of fifty (50) cents on each ton of ore when delivered or shipped, until the amount so paid to defendant shall amount to the sum of Forty-five Thousand (\$45,000.00) Dollars; that plaintiff is informed and believes, and on such information and belief alleges that of said sum of Forty-five Thousand (\$45,000.00) Dollars there has been paid by said Summit Copper Company to defendant, the sum of Ten Thousand (\$10,000.00) Dollars, more or less, leaving a balance due of the sum of Thirty-five Thousand (\$35,000.00) Dollars, more or less; that the total amount of cash and money thus received by defendant from said Stauffer Chemical Company and said Summit Copper Company in cash and money on account of the purchase price of said group of mines is, as plaintiff is informed and believes, the sum of Fifty Thousand (\$50,000.00) Dollars, more or less; that plaintiff is informed and believes, and on such information and belief alleges that said Stauffer Chemical Company and said Summit Copper Company have,

and each of them has, fully complied with all the terms and conditions of said sale.

V.

That upon the completion and consummation of said sale and of the subsequent payment of the sum of Fifty Thousand (\$50,000.00) Dollars, more or less, in cash and money, as hereinabove set forth, there became due and payable to plaintiff the sum of Five Thousand (\$5,000.00) Dollars, more or less; that although frequently thereunto demanded by plaintiff, defendant has failed, neglected and refused, and still fails, neglects and refuses to pay to plaintiff said sum of Five Thousand (\$5,000.00) Dollars, or any part thereof, and the whole of said sum of Five Thousand (\$5,000.00) Dollars is due, owing and unpaid [8] by defendant to plaintiff.

VI.

That plaintiff has duly performed all the conditions and terms required on his part to be performed in and by the terms of the aforesaid authorization and agreement.

WHEREFORE, plaintiff prays judgment against said defendant for the sum of Ten Thousand (\$10,000.00) Dollars together with interest thereon from the first day of February, 1908, to the date hereof, together with his costs of suit herein, and together with such other and further relief as may be meet in the premises.

MORRISON & BROBECK,
PERRY & KERRIGAN,

Attorneys for Plaintiff.

State of California,
City and County of San Francisco,—ss.

M. E. Dittmar, being first duly sworn, deposes and says: That he is the plaintiff in the above-entitled action; that he has read the foregoing fourth amended complaint, and knows the contents thereof and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

M. E. DITTMAR.

Subscribed and sworn to before me this 21st day of March, 1911.

[Seal]

R. B. TREAT,

Notary Public in and for the City and County of
San Francisco, State of California. [9]

Receipt of a copy of the within Complaint is hereby admitted this 21st day of March, 1911.

L. A. REDMAN,

Attorney for Defendant.

[Endorsed]: Filed Mar. 21, 1911. Southard Hoffman, Clerk. By W. B. Maling, Deputy Clerk. [10]

In the Circuit Court of the United States, Ninth Circuit, in and for the Northern District of California.

M. E. DITTMAR,

Plaintiff,

vs.

PHOENIX SECURITIES COMPANY (a Corporation),

Defendant.

Demurrer to Fourth Amended Complaint.

Comes now the defendant above-named and demurring unto the fourth amended complaint, for ground of demurrer, specifies that said fourth amended complaint does not state facts sufficient to constitute a cause of action.

Demurring unto the first count or cause of action in said fourth amended complaint, for ground of demurrer, defendant specifies:

1. That said first count does not state facts sufficient to constitute a cause of action.

2. That the cause of action stated in said first count is barred by the provisions of subdivision 1 of Section 339 of the Code of Civil Procedure of the State of California.

3. That said first count is uncertain in the following particulars:

(a) It cannot be ascertained therefrom if the defendant has received any sum or amount of money for the properties referred to in said count in excess of the sum of \$75,000.

(b) It cannot be ascertained therefrom if the defendant has received any sum of money for the properties referred to. [11]

(c) It cannot be ascertained therefrom if the Stauffer Chemical Company has paid to the defendant the sum of \$85,000, or any sum.

(d) It cannot be ascertained therefrom what time was given the plaintiff to find a purchaser of the mines for the defendant, or if the plaintiff found

a purchaser within the time specified in the agreement.

(e) It cannot be ascertained therefrom if the sale of the properties has been completed and consummated.

(f) It cannot be ascertained therefrom when the sale of the properties was completed or consummated.

(g) It cannot be ascertained therefrom what are the terms or conditions of the alleged sale from the defendant to the Stauffer Chemical Company referred to in paragraph IV.

(h) It cannot be ascertained therefrom what terms were arranged for the payment of the sum of \$85,000.

(i) It cannot be ascertained therefrom what are the terms or conditions referred to in paragraph VI.

4. That said first count is unintelligible in the same respects that it is alleged to be uncertain.

5. That said first count is ambiguous in the same respects that it is alleged to be uncertain.

Demurring unto the second count or cause of action in said fourth amended complaint, for ground of demurrer, defendant specifies:

1. That said count does not state facts sufficient to constitute a cause of action.

2. That the cause of action stated in said second count is barred by the provisions of subdivision 1 of Section [12] 339 of the Code of Civil Procedure of the State of California.

3. That said second count is uncertain in the following particulars:

(a) It cannot be ascertained therefrom if the cause of action therein attempted to be stated is based upon an express or an implied contract.

(b) It cannot be ascertained therefrom if there was any agreement as to the payment of plaintiff for finding a purchaser of the properties.

(c) It cannot be ascertained therefrom if the defendant agreed to pay plaintiff the sum of \$10,000 or any sum, for securing a purchaser of the property.

(d) It cannot be ascertained therefrom if the plaintiff requested the defendant to perform the alleged work and services referred to.

(e) It cannot be ascertained therefrom what are the terms or conditions of the alleged sale from the defendant to the Stauffer Chemical Company.

(f) It cannot be ascertained therefrom how much time or skill or money was expended by the plaintiff in and about the alleged work and services.

(g) It cannot be ascertained therefrom what are the conditions or terms referred to in paragraph VII.

4. That said second count is unintelligible in the same respects that it is alleged to be uncertain.

5. That said second count is ambiguous in the same respects that it is alleged to be uncertain.

Demurring unto the third count or cause of action in said fourth amended complaint for ground of demurrer, defendant specifies: [13]

1. That said third count does not state facts sufficient to constitute a cause of action.

2. That the cause of action stated in said third count is barred by the provisions of subdivision 1 of

Section 339 of the Code of Civil Procedure of the State of California.

3. That said third count is uncertain in the following particulars:

(a) It cannot be ascertained therefrom what time was given the plaintiff to find a purchaser for the properties referred to.

(b) It cannot be ascertained therefrom if the plaintiff found a purchaser for the properties within the time given him to do so.

(c) It cannot be ascertained therefrom with whom the Summit Copper Company agreed to pay to defendant the sum of fifty cents on each ton of ore shipped or delivered.

(d) It cannot be ascertained therefrom in what manner plaintiff in this action is affected by any agreement of the defendant and the Summit Copper Company.

(e) It cannot be ascertained therefrom what are the terms or conditions of the sale alleged to have been fully complied with by the Stauffer Chemical Company and the Summit Copper Company.

(f) It cannot be ascertained therefrom what are the conditions or terms alleged to have been performed by the plaintiff.

4. That said third count is unintelligible in the same respects that it is alleged to be uncertain.

5. That said third count is ambiguous in the same [14] respects that it is alleged to be uncertain.

WHEREFORE defendant prays to be hence dismissed with its costs.

L. A. REDMAN,
Attorney for Defendant.

Service of the within Demurrer admitted this 14th day of April, 1911.

PERRY & DAILEY,
PERRY & KERRIGAN,
MORRISON & BROBECK,
Attorneys for Pl.

[Endorsed]: Filed Apr. 14, 1911. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.
[15]

At a stated term, to wit, the March term, A. D. 1911, of the Circuit Court of the United States of America of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the City and County of San Francisco, on Monday, the 5th day of June, in the year of our Lord one thousand nine hundred and eleven. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 14,982.

M. E. DITTMAR

vs.

PHOENIX SECURITIES CO.

Order Overruling Defendants' Demurrer to Fourth Amended Complaint.

Defendants' demurrer to the fourth amended complaint and motions to strike out, heretofore heard and submitted being fully considered and the Court having rendered its oral opinion thereon it was ordered that said demurrer be and the same is hereby

overruled and that said motions to strike out be and the same are hereby denied. [16]

In the Circuit Court of the United States, Ninth Circuit, in and for the Northern District of California.

Number 14,982.

M. E. DITTMAR,

Plaintiff,

vs.

PHOENIX SECURITIES COMPANY (a Corporation),

Defendant.

Answer to Fourth Amended Complaint.

Comes now the defendant above-named and answering unto plaintiff's fourth amended complaint herein denies and alleges as follows:

I.

1. Answering unto the first count or alleged cause of action in said complaint defendant denies that sometime prior to the first day of May, 1907, or at any time it made and entered into or made or entered into an or any agreement with plaintiff by the terms or any term of which alleged or any agreement defendant did authorize plaintiff to find a purchaser for the group of mines referred to in the fourth amended complaint herein or for any portion thereof or for any property whatsoever, and denies that the defendant did further or at all agree that if and when or if or when or upon any condition or at any time plaintiff should find a purchaser for the group of

mines referred to in said complaint who should be ready, willing and able or ready or willing or able to purchase said group of mines or any other property for the sum of not less than Seventy-five Thousand Dollars (\$75,000) net to the defendant, or for any sum and payable or payable upon such or any term or terms as might be agreeable and satisfactory [17] or either thereof to the defendant or any person or upon any term or terms that the defendant would upon the completion and consummation or either thereof of such sale, or in any event, pay to plaintiff on account of the alleged services of plaintiff in furnishing such alleged purchaser to defendant or for any service or services such sum of money in excess of said sum of Seventy-five Thousand Dollars (\$75,000) or any sum as said group of mines or any portion thereof or any property might be sold by the defendant or any person to such purchaser furnished by plaintiff or to any person or that defendant agreed to pay plaintiff any sum of money whatever in any event.

2. Defendant denies that pursuant to the alleged authorization and agreement or either thereof or pursuant to any authorization or agreement, and in performance thereof, or in performance thereof, or otherwise, plaintiff did undertake to find a purchaser for the aforesaid group of mines or for any property and on or about the first day of May, 1907, or on and about the first day of May, 1907, or at any time, plaintiff did discover a prospective or any purchaser for said or any property and did introduce and bring to defendant or did introduce or bring to defendant as

such purchaser or otherwise a certain or any corporation or person known as Stauffer Chemical Company or otherwise, a person who was then and there or then or there or at any time or at any place willing, able and ready or willing or able or ready to purchase the aforesaid group of mines or any property from defendant, and did then and there or did then or there agree to purchase the same or any property and to pay or to purchase the same or any property or to pay therefor the sum of Eighty-five Thousand Dollars (\$85,000) or any sum, provided terms of payment of said sum of eighty-five thousand dollars (\$85,000) or any sum could be arranged satisfactory to the defendant and to said Stauffer Chemical [18] Company, or either thereof, or in any event.

3. Defendant denies that on or about or on and about the first day of February, 1908, the defendant and the Stauffer Chemical Company, or either of them, did arrange terms of payment of the alleged purchase price of Eighty-five Thousand Dollars (\$85,000) satisfactorily to defendant and said Stauffer Chemical Company, or either thereof. Defendant denies that pursuant to the alleged terms of purchase and sale, or either thereof or pursuant to any term or terms defendant did sell and convey, or sell or convey to said Stauffer Chemical Company the aforesaid group of mines or any property. Defendant denies that said Stauffer Chemical Company has fully complied with all the conditions and terms of said alleged sale and denies that said Stauffer Chemical Company has fully or at all complied with all the terms and conditions or with all or any term

or terms or condition or conditions of the alleged sale of the group of mines referred to in the fourth amended complaint to said Stauffer Chemical Company.

4. Defendant denies that upon the completion and consummation or upon completion or consummation of said alleged sale or otherwise or in any event there became due and payable or due or payable to plaintiff the sum of Ten Thousand Dollars (\$10,000) or any sum. And defendant denies that it has failed, neglected and refused or has failed or neglected or refused and still or still or at all fails, neglects and refuses, or either thereof to pay plaintiff any sum of money due from said defendant to the plaintiff. And defendant denies that the whole of said sum of Ten Thousand Dollars (\$10,000) or any portion thereof is due, owing and unpaid or due or owing or unpaid by the defendant to the plaintiff. [19]

5. Defendant denies that plaintiff has duly performed all the conditions and terms, or either thereof, required on his part to be performed in and by or in or by the terms of the alleged authorization and agreement or either thereof, and defendant denies that there is or was any such authorization or agreement.

6. Further answering said first cause of action and as a separate defense thereto defendant alleges that said cause of action is barred by the provisions of subdivision 1 of section 339 of the Code of Civil Procedure of the State of California.

7. Further answering said first cause of action defendant alleged that said cause of action is barred

by the provisions of subdivision 1 of section 337 of the Code of Civil Procedure of the State of California.

8. Further answering said first cause of action and as a separate defense thereto defendant alleges that the plaintiff was employed by the Stauffer Chemical Company, a corporation, the alleged purchaser of the property referred to in the fourth amended complaint and plaintiff acted for and on behalf of said Stauffer Chemical Company and as its agent for a compensation agreed upon between said Stauffer Chemical Company and plaintiff in negotiating on behalf of said Stauffer Chemical Company for the purchase of the property referred to in the fourth amended complaint. That if plaintiff purported to act as the agent of the defendant, then plaintiff was acting or purporting to act as the agent of both the seller and the alleged purchaser of said property in negotiating for the sale and purchase thereof. That said defendant did not know of nor did it consent to such double agency. [20]

II.

Answering the second cause of action to plaintiff's fourth amended complaint defendant denies and alleges as follows:

1. Defendant denies that some time prior to the first day of May, 1907, or at any time it made and entered into or made or entered into an or any agreement with plaintiff by the terms of which alleged or any agreement defendant did authorize plaintiff to find a purchaser for the group of mines referred to in the fourth amended complaint herein

or any property who would be ready, willing and able, or ready or willing or able to purchase said group of mines or any property from the defendant or from any person upon such terms and conditions or upon such or any term or terms or condition or conditions as might subsequently or at any time by means of negotiations to be had between defendant and such prospective purchaser or between said defendant or such prospective purchaser or any person, or by any means, be agreed upon between defendant and such prospective purchaser or any person.

2. Defendant denies that pursuant to the alleged authorization and agreement or either thereof, or otherwise and in performance thereof, or in performance thereof or otherwise plaintiff did on or about or on and about the first day of May, 1907, or at any time discover a prospective or any purchaser for said or any property, and did introduce and bring to the defendant or did introduce or bring to the defendant said certain prospective purchaser, to wit, the Stauffer Chemical Company, a corporation, or any person, who was then and there or then or there able and willing and ready, or able or willing or ready to purchase said group of mines or [21] any property and did then and there or did then or there agree to purchase the same or any property for the sum of Eighty-five Thousand Dollars, or any sum, provided that the aforesaid group of mines or any property might be purchased by said Stauffer Chemical Company from defendant upon such terms and conditions or upon such or any term or

terms or condition or conditions as might be satisfactory to both said Stauffer Chemical Company and the defendant or either thereof, or upon any condition.

3. Defendant denies that on or about or on and about the first day of February, 1908, the Stauffer Chemical Company and the defendant or either of them did arrange and agree or arrange or agree upon the terms and conditions or upon the term or terms or condition or conditions of the alleged sale and purchase or either thereof of the said group of mines, and defendant denies that pursuant to the said or any term or terms of sale and purchase or either thereof the defendant did sell and convey or sell or convey to said Stauffer Chemical Company the aforesaid group of mines or any property for the agreed price of Eighty-five Thousand Dollars (\$85,000) or for any price. Defendant denies that said Stauffer Chemical Company has fully complied with all the terms and conditions of the alleged sale and denies that the Stauffer Chemical Company has complied with all or any of the terms and conditions or either thereof of the alleged sale of said property to it.

4. Defendant denies that the plaintiff did spend much time, skill and money or much or any time or skill or money in and about or in or about the alleged work and services or work or services alleged to have been rendered to the defendant in securing the said Stauffer Chemical Company as a purchaser for said group of mines or in any work or service for defendant. And defendant denies that said

Stauffer Chemical [22] Company was secured as a purchaser for the said group of mines solely or at all through the labor, services, skill and expenditures or through the labor or service or services or skill or expenditure or expenditures of the plaintiff. And defendant denies that the reasonable or any value of the alleged work, services, skill and expenditures or either thereof as set forth in the second cause of action or otherwise is the sum of Ten Thousand Dollars (\$10,000) or any sum.

5. Defendant denies that the whole or any part of the sum of Ten Thousand Dollars (\$10,000) or any sum remains or is due, owing and unpaid or due, or owing or unpaid to plaintiff.

6. Defendant denies that plaintiff has performed all or any of the conditions and terms or conditions or terms alleged to have been required on his part to be performed in and by or in or by the terms of the alleged authorization and agreement or either thereof.

7. Further answering said second cause of action and as a separate defense thereto defendant alleges that said cause of action is barred by the provisions of subdivision 1 of section 339 of the Code of Civil Procedure of the State of California.

8. Further answering said second cause of action defendant alleges that said cause of action is barred by the provisions of subdivision 1 of section 337 of the Code of Civil Procedure of the State of California.

9. Further answering said second cause of action and as a separate defense thereto defendant alleges that the plaintiff was employed by the Stauffer Chem-

ical Company, a corporation, the alleged purchaser of the property referred to in the fourth amended complaint and plaintiff acted for and on behalf of said Stauffer Chemical Company and as its agent for a compensation [23] agreed upon between said Stauffer Chemical Company and plaintiff in negotiating on behalf of said Stauffer Chemical Company for the purchase of the property referred to in the fourth amended complaint. That if plaintiff purported to act as the agent of the defendant, then plaintiff was acting or purporting to act as the agent of both the seller and the alleged purchaser of said property in negotiating for the sale and purchase thereof. That said defendant did not know of nor did it consent to such double agency.

III.

Answering the third cause of action in plaintiff's fourth amended complaint defendant denies and alleges as follows:

1. Defendant denies that some time prior to the first day of May, 1907, or at any time defendant made and entered into or made or entered into an or any agreement with plaintiff in and by or in or by the terms or any term of said or any agreement defendant did authorize plaintiff to find a purchaser for that certain group of mines known as the Summit Consolidated Group of Mines, the Graves Consolidated Group of Mines, and the North Mammoth Extension Group of Mines, all situate, lying and being in Sections 20 and 30, Township 34 North, Range 5 West, M. D. M., in the County of Shasta, State of California, and generally known as the

Summit and Graves property then owned by the defendant or any part or portion of said property or any property whatsoever; and denies that defendant did further or at all agree that it would pay to plaintiff if and when or if or when plaintiff should find a purchaser for the said group of mines or any property who was ready, willing and able or ready or willing or able to purchase of defendant or any person said group of mines or any property, defendant would pay to plaintiff as and for or as or for a compensation or otherwise a commission for the services of plaintiff in finding [24] such purchaser or any purchaser, or for any services, ten per cent of such money as defendant might thereafter actually receive in cash and money on account of the sale or of such money as defendant might thereafter actually or at all receive in cash or money on account of the sale to such prospective or any purchaser of the aforesaid group of mines or any property or that defendant would pay to plaintiff any sum of money whatever in any event.

2. Defendant denies that pursuant to the alleged authorization and agreement or either thereof or pursuant to any authorization or agreement, and in performance thereof or in performance thereof, or otherwise, plaintiff did undertake to find a purchaser for said group of mines and on or about or on and about the first day of May, 1907, or at any time plaintiff did discover a prospective or any purchaser for said or any properties and did introduce and bring to defendant or did introduce or bring to defendant as such purchaser or otherwise a cer-

tain corporation known as Stauffer Chemical Company or any person who was then and there or then or there or at any time or at any place willing, able and ready or willing or able or ready to purchase the said group of mines or any property from the defendant and did then and there or then or there agree to purchase the same and to pay therefor or to purchase the same or to pay therefor the sum of Eighty-five Thousand Dollars (\$85,000) or any sum.

3. Defendant denies that subsequently and on or about the first day of February, 1908, or subsequently or on and about the first day of February, 1908, or at any time defendant did sell and convey or sell or convey to the Stauffer Chemical Company the said group of mines, and that or that on and about or on or about the first day of February, 1908, did arrange the terms or any term of payment satisfactorily to defendant or [25] otherwise, and defendant denies that it has received from the Stauffer Chemical Company or any person the sum of Forty Thousand Dollars (\$40,000) in cash and money, or either thereof which has been actually or at all paid prior to the date of the filing of the fourth amended complaint or at any time, and the further or the further sum of cash and money or either thereof as set forth in the third cause of action, or otherwise, or any sum. And defendant alleges that it has no information or belief upon the subject sufficient to enable it to answer the allegations that the sum of Forty-five Thousand Dollars (\$45,000) will be paid in the future according

to the terms and conditions of the alleged instrument dated the 5th day of February, 1908, in writing between defendant and the Summit Copper Company, a corporation organized and existing under the laws of the State of Maine, and therefore and upon that ground defendant denies each and every of said allegations. And defendant denies that the Summit Copper Company did undertake for and on behalf of the Stauffer Chemical Company to pay the balance of Forty-five Thousand Dollars (\$45,000) on account of the purchase price of the said group of mines. Defendant denies that of the alleged sum of Forty-five Thousand Dollars (\$45,000) there has been paid by the Summit Copper Company to the defendant or any person the sum of Ten Thousand Dollars (\$10,000) more or less or any sum whatsoever, leaving a balance due of the sum of Thirty-five Thousand Dollars (\$35,000) more or less or any sum less than the original alleged balance. Defendant denies that the total or any amount of cash and money or either thereof thus or at all received by the defendant from the Stauffer Chemical Company and the Summit Copper Company, or either of them in cash and money or in cash or money on account of the alleged purchase price of said group of mines is the sum of Fifty Thousand Dollars (\$50,000) more or less. [26] Defendant denies that the Stauffer Chemical Company and the Summit Copper Company or either of them have fully or at all complied with all or any of the terms and conditions or terms or conditions of any sale of the said group of mines to the said

Stauffer Chemical Company or with all the terms and conditions or terms or conditions of the alleged or any sale.

4. Defendant denies that upon the alleged completion and consummation or either thereof of the alleged sale and of the alleged subsequent payment of the sum of Fifty Thousand Dollars (\$50,000) more or less or of the subsequent or any payment of the sum of Fifty Thousand Dollars (\$50,000) more or less or any sum in cash and money or either thereof as set forth in the third cause of action or otherwise or in any event there became due and payable or due or payable to plaintiff the sum of Five Thousand Dollars (\$5,000), more or less, or any sum. Defendant denies that it has failed, neglected and refused or failed or neglected or refused and still fails, neglects and refuses or still or at all fails, neglects or refuses to pay plaintiff any sum which may be due plaintiff. And defendant denies that the whole of said sum of Five Thousand Dollars (\$5,000) or any part of said sum or any sum of money whatsoever is due, owing and unpaid or due or owing or unpaid by the defendant to the plaintiff.

5. Defendant denies that plaintiff has performed all or any of the conditions and terms or conditions or terms alleged to have been required on his part to be performed in and by or in or by the terms of the alleged authorization and agreement or either thereof.

6. Further answering said third cause of action and as a separate defense thereto defendant alleges that said cause of action is barred by the provisions

of subdivision 1 of Section 339 of the Code of Civil Procedure of the State of California. [27]

7. Further answering said third cause of action defendant alleges that said cause of action is barred by the provisions of subdivision 1 of Section 337 of the Code of Civil Procedure of the State of California.

8. Further answering said third cause of action and as a separate defense thereto defendant alleges that the plaintiff was employed by the Stauffer Chemical Company, a corporation, the alleged purchaser of the property referred to in the fourth amended complaint and plaintiff acted for and on behalf of said Stauffer Chemical Company and as its agent for a compensation agreed upon between said Stauffer Chemical Company and plaintiff in negotiating on behalf of said Stauffer Chemical Company for the purchase of the property referred to in the fourth amended complaint. That if plaintiff purported to act as the agent of the defendant, then plaintiff was acting or purporting to act as the agent of both the seller and the alleged purchaser of said property in negotiating for the sale and purchase thereof. That said defendant did not know of nor did it consent to such double agency.

WHEREFORE, defendant prays that plaintiff take nothing by this action and that it be hence dismissed with its costs.

L. A. REDMAN,
Attorney for Defendant.

United States of America,
State of New York,
County of New York,—ss.

Richard S. Batson, being first duly sworn, deposes and says: That he is an officer of the defendant corporation in the above-entitled action, to wit, the Treasurer thereof; that he has read the foregoing answer to the fourth amended complaint and knows the contents thereof, and that the same is true [28] of his own knowledge except as to matters therein stated upon information or belief and as to such matters he believes it to be true.

RICHARD S. BATSON.

Subscribed and sworn to before me this 27th day of July, A. D. 1911.

[Seal]

WALTER F. WELCH,

Notary Public in and for the County of Queens.

Certificate filed in the County of New York, State of New York.

Service of the within answer admitted this 3d day of August, 1911.

PERRY & DALEY,

MORRISON, DUNNE & BROBECK,

Attorneys for Pl.

[Endorsed]: Filed August 4, 1911. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk. [29]

*In the District Court of the United States, in and for
the Northern District of California, Second
Division.*

No. 14,982.

M. E. DITTMAR,

Plaintiff,

vs.

PHOENIX SECURITIES CO. (a Corporation),
Defendant.

Waiver of Trial by Jury.

A jury in the above-entitled action is hereby
waived.

Dated December 4th, 1913.

MORRISON & BROBECK,
Attorneys for Plaintiff.

L. A. REDMAN,
Attorney for Defendant.

[Endorsed]: Filed Dec. 30, 1913. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [30]

*In the District Court of the United States, in and for
the Northern District of California, Second
Division.*

No. 14,982.

M. E. DITTMAR,

Plaintiff,

vs.

PHOENIX SECURITIES COMPANY, a Corpo-
ration,

Defendant.

Judgment.

This cause having come on regularly for trial on the 4th day of December, 1913, being a day in the November, 1913, Term of said Court, before the Court and a jury of twelve men duly impaneled and sworn to try the issues joined herein: R. L. McWilliams, Esq., appearing as attorney for plaintiff and L. A. Redman, Esq., appearing as attorney for defendant. By stipulation in open Court on said day, by counsel for both sides the trial and submission of this cause to a jury was waived and the trial proceeded with to be submitted to the Court for decision without a jury; and the trial having been proceeded with on the 5th day of December, in said year and term, and oral and documentary evidence upon behalf of the respective parties having been introduced and closed and the cause having been submitted to the Court without argument on briefs to be filed; and the Court being now fully advised in the premises having ordered that judgment be entered in favor of plaintiff and against said defendant in the sum of Five Thousand (\$5,000.00) Dollars and for costs:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that M. E. Dittmar, plaintiff, do have and recover of and from Phoenix Securities Company, a corporation, defendant, the sum of Five Thousand (\$5,000.00) Dollars, together with his costs in this

behalf expended [31] taxed at \$58.20.

Judgment entered August 26, 1914.

WALTER B. MALING,
Clerk.

A True Copy. Attest:

[Seal] WALTER B. MALING,
Clerk.

[Endorsed]: Filed Aug. 26, 1914. Walter B.
Maling, Clerk. [32]

*In the District Court of the United States for the
Northern District of California.*

M. E. DITTMAR,

Plaintiff,

vs.

PHOENIX SECURITIES COMPANY (a Corpo-
ration),

Defendant.

This case came on regularly for trial before the Court sitting without a jury, on December 4, 1913, a jury having been duly waived by written stipulation filed in the case as provided by law, Messrs. Morrison, Dunne & Brobeck and R. L. McWilliams, Esq., appearing for the plaintiff, and L. A. Redman, Esq., appearing for the defendant; whereupon the following proceedings were had:

[Testimony of A. C. Jentzen, for Plaintiff.]

A. C. JENTZEN, a witness called on behalf of plaintiff, being duly sworn, testified as follows:

I am connected with the Stauffer Chemical Com-

(Testimony of A. C. Jentzen.)

pany and have been connected with it for about twenty years. I am familiar with certain properties in Shasta County which it purchased from defendant. I know of the payments made by the Stauffer Chemical Company for those properties. The sum of \$7,950.00 was paid prior to the commencement of this suit. Subsequent to the commencement of the action additional payments have been made, making in all up to to-day the sum of \$51,000.

[Testimony of Charles Kunze, for Plaintiff.]

CHARLES KUNZE, a witness called on behalf of the plaintiff, being duly sworn, testified as follows:
[33*—1†]

I am the manager of the Stauffer Chemical Company. I have been connected with it for fifteen years. I was connected with it in the month of December, 1906. At that time I was looking up mines for them. I recall a conversation which I had with plaintiff during the month of December, 1906. The purpose of this conversation was to find out who owned the Summit Group of mining claims. Mr. Dittmar was represented to me by people in Redding as being the man who had the Summit Group of mining claims for sale. I had been up on the Copper Belt for sometime looking around, and I found that the Summit looked pretty good, and I thought we would like to take a bond on it. I saw Mr. Dittmar and talked to him about it and he said that he was

*Page-number appearing at foot of page of original certified Record.

†Original page-number appearing at foot of page of Testimony as same appears in Certified Transcript of Record.

(Testimony of Charles Kunze.)

the agent and it could be bought for \$75,000 on a bond. He did not suggest that at the first conversation, but at the second conversation I had with him, he suggested that the Phoenix Securities Company wanted \$75,000, but that the property was probably worth more money, and that we make some commission out of it, he and I together; I told him that I was being taken care of by the Stauffer Chemical Company, that is, I was to have an interest in the property, and that I did not want any commission, and so he said, "Well, that is all right, but of course I want a commission," and I said, "That is perfectly natural; how much do you want?" He said "\$12,500." I said, "That is too much." Finally after a day or two we decided to add \$10,000 to the \$75,000, making \$85,000, and the bond was made for \$85,000 for eighteen months. There was no understanding whereby our Company was to pay Mr. Dittmar any sum for his services. A month or two subsequent to my first conversation with him, he showed me over the properties. Meanwhile he had taken a trip to New [34—2] York. I had been around the properties before that time, all over the Copper Belt.

Cross-examination.

I was not in the employ of the Stauffer Chemical Company but I was told by Mr. Stauffer to look up mines and I could participate. I did not mention anything about this property to any officer of the Stauffer Chemical Company before I saw Mr. Dittmar. I mentioned the property to the Stauffer

(Testimony of Charles Kunze.)

people after I had been in Shasta the first time, and the first time I was in Shasta County, I did not see Mr. Dittmar. I was looking up properties which I thought they might purchase, and it was in that view of the matter that I discussed the situation with Mr. Dittmar. After talking with him on the first occasion, I told them about the Summit Group of mines, and told them that Mr. Dittmar was the agent for the mine, and told them all about it. I got the information that Mr. Dittmar was the agent from people in Redding. They told me that he was the agent for the Summit Group of Mines. I was never told that by anybody connected with the Phoenix Securities Company. All I know about it is what I was told by people in Redding. I don't really remember whether anything was said about the price at my first conversation with Mr. Dittmar. He said that New York people owned the property. I believe he said that he had sold it to them. He suggested that we raise the price to \$100,000, and that he and I make \$12,500 apiece, but I said, "No I don't want to do that because I am already protected by the Stauffer Chemical Company. In fact, I have an understanding with Mr. Stauffer that I am to participate in this mine, and I want to buy it as cheaply as I can." Then Mr. Dittmar said, "All right we will make [35—3] it \$12,500 then." I saw Mr. Dittmar every day for two or three weeks or a month before he went to New York. Before he went [36—3½] to New York I spoke to him about the price of the mine and about the amount of his commission.

(Testimony of Charles Kunze.)

He told me \$75,000 was the price net, and that he wanted to add this money and make a commission. He wanted to make it \$100,000 first and then I said I did not want to do that because I wanted to buy the property as cheaply as possible, and he said then \$12,500, making \$87,500 the price he would ask, and I said that was too much, and I said \$10,000 was plenty, and finally we agreed on \$10,000, and added that to \$75,000, and of course, I always understood that everything was finally understood, and there would be no back talk, or anything about it. I am entirely satisfied that this talk about a commission was before he went to New York. I did not discuss the question of commission with the officers of the Chemical Company. We simply added \$10,000 to the original price. I supposed he was to get \$10,000 when the money was paid. We did all our business with the New York people, with Hatch & Clute. I mean my Company did.

[Testimony of M. E. Dittmar, on His Own Behalf.]

M. E. DITTMAR, plaintiff, being duly sworn, testified as follows:

I reside at Redding, California. I have lived in this State about twenty years; about nineteen years in Redding. I am acquainted with the properties described in the complaint. I was formerly the owner of a part of these properties. I had a conversation with Mr. Charles Kunze in regard to these properties in the latter part of 1906. I should say in October or early in November. Mr. Kunze called

(Testimony of M. E. Dittmar.)

on me at my office in Redding, and asked me regarding the status and the ownership of the Summit and the Graves Group of mines, particularly in the Backbone Mining District, Shasta County, and stated that he represented the Stauffer [37—4] Chemical Company, and he was interested in the territory in question, and asked me if I, knowing the owners, would get from them a proposition for the sale of the properties, providing that it was on the market; and I told him that as they were not doing anything but assessment work on their location, in all probability it could be secured. I told Mr. Kunze further, that I contemplated a trip to New York in the course of a few weeks, and in all probability I could take it up to better advantage with them at that time, because the owners of the property really knew little about it there; they had secured it about a year before, and all the work they had done in the meantime was assessment work for one season, and had no one in the district particularly outside of such information as I gave them from time to time to represent their interest on the ground; in fact, there was no one on the ground at the time that Mr. Kunze called, that is no work being done and no one in direct charge of the property. After going to New York I called on Mr. Hatch of the firm of Hatch & Clute with whom I had had considerable correspondence previously regarding the property, and I knew that he was personally interested or entirely represented the Phoenix Securities people. On my first visit to his office

(Testimony of M. E. Dittmar.)

I discussed the situation generally as to the property, and told him that it was possible that a deal could be made, provided the right kind of a proposition could be secured; that the property really required quite a bit of development work as it was prospective in character, although at that time it had gained quite a little bit in its prospective importance, because it adjoined the properties of the Mammoth Copper Mining Company, which are operating very largely in that district. He asked me what [38—5] I thought could be done. I told him that if a liberal development bond was given extending over a considerable period of time, that I thought \$75,000 was not an excessive price to ask for the ground under a development bond. I left him with the expectation that he would see others in interest, and let me know later on what might be done. I think that on the next day I called upon a Mr. Reif, who was President of the Corporation, but apparently he was not very much of a factor in it, but really represented the main owner, a man by the name of William Connor, who I believe at one time was a broker for the Gould interests in New York. But I left it in that state and had occasion to go to Boston where I remained three or four days, and then I returned to New York about the second week in December, 1906, and called on Mr. Hatch again, and he did not have matters in a definite shape at the time, or stated that he had been busy, or could not dispose of the matter, and it was suggested—whether I made the suggestion or he

(Testimony of M. E. Dittmar.)

made it, I do not know—that I call on Mr. Connor at his office, and he would arrange an interview for me with Mr. Connor the next day. I did this, and I discussed the matter with Mr. Connor much in the same line as I talked about the situation and the property with Mr. Hatch. Then on the day following the discussion with Mr. Connor I returned to the office of Hatch & Clute and got the situation definitely from Mr. Hatch that they would be willing to deal on an eighteen months' option for \$75,000, and leaving it for me to get any profit that I could over that amount, providing I could make the arrangements with the buyers, telling me also that they had in view dealing with some other people, and he would like to have me get active in the matter as quick as possible if [39—6] the thing could be arranged. Of course, I took that with some grain of allowance, because I knew that the property was undeveloped, and that frequently people try to urge action in that manner. I returned to California early in January. I think I returned the latter part of December, but I took the matter up again in January with Mr. Kunze of the Stauffer Chemical Company, telling Mr. Kunze that the property could be had for \$75,000 net to the owner, and that the term of development under that \$75,000 option bond would be eighteen months. I discussed with Mr. Kunze then my status in the case and his own. I did not know whether Mr. Kunze was dealing direct for the Stauffer people or whether he was seeking to make some commission out of the deal.

(Testimony of M. E. Dittmar.)

But Mr. Kunze advised me that he was representing the Stauffer people direct, and that he would be interested in the property, and that I would only have to take care of myself so far as a commission was concerned. We discussed the bond and finally it was agreed that \$10,000 to add to the price of \$75,000 which the Phoenix Securities Company was not excessive, that is on an eighteen months bond they would be perfectly willing if they took the property at the end of that time to pay \$10,000 additional for my services in the matter. The time devoted to the work in New York all told perhaps covered a week or at the outside ten days. I was in New York and Boston nearly two weeks. I could not say definitely what my expenses were on that trip. I have not the note-book with me, otherwise I could give you exact information. I should judge that that part that would be charged directly to the work would be \$200 or \$225. I had no other special business in New York. After my trip to New York I took Mr. Kunze and another representative of the buyers, [40—7] Mr. De Guigne, over the property; that was early in February. The ore in these properties was chiefly copper; the contents are copper, gold and silver, and the copper is the most valuable of the ores in that district. It requires a great deal more capital to develop the copper than the gold or silver. These properties in an air line from Kennett are, I should say, about four miles. Kennett is the nearest railroad station. By a very difficult wagon road and trail I should say it was above seven miles. There

(Testimony of M. E. Dittmar.)

was no railroad completely through to the properties. There was perhaps 1500 to 1800 feet of open development work, consisting chiefly of tunnels and drifts and some shallow shafts on the grounds, but was prospective in character so far as a copper mine is concerned. There was a considerable showing of value, but no large tonnage. I have been in the mining business about fifteen years. I am acquainted with the commissions usually allowed for the sale of mining properties. I am familiar with the terms upon which these properties were eventually sold. Personally, I have not the knowledge except the facts as I got them from the people who carried out the deal, the people representing the Summit Group Company, the Stauffer Chemical Company and the Phoenix Securities Company. I am familiar with the contract letter dated December 27th, 1907, referred to in the deposition of Mr. Hatch and of the terms of sale embodied in it. There has been considerable correspondence between me and the Phoenix Securities Company during the period prior to the consummation of this sale. I was familiar with the properties involved in this action between May, 1907, and December of that year. The Stauffer Chemical Company was continually employed on or about the properties during that period. Work did not [41—8] cease up to the time that the new contract was entered into. I have been engaged as a mining broker, that is, in part, but not altogether, but I was alert on that work when the opportunity offered. Since 1899 I have been engaged in part as

(Testimony of M. E. Dittmar.)

a mining broker. I held myself out as such. I was connected with a mining publication, and interested in mines continuously in some capacity or other, ownerships and sometimes directing work and I made it part of my business to negotiate mining transfers. Since the very beginning of my activities on the Shasta County Copper field I have been in touch with mining property and have been over the district again and again, and I am recognized as somewhat of an authority on the Copper Belt in Shasta County.

Q. Assuming the fact you stated with regard to the nature of these properties and their accessibility and the nature of the agreement which you originally had with the Phoenix Securities Company and the sale that was finally consummated, what in your opinion would be the reasonable value of your services in bringing about the final consummation of that deal?

To which question defendant objected upon the ground that the evidence sought to be elicited was immaterial, irrelevant and incompetent, and that no proper foundation had been laid for it, which objection was by the court overruled and an exception noted on behalf of defendant.

A. I consider under the circumstances the arrangement arrived at as not unreasonable; by the arrangement arrived at I mean that if the mine developed I would ultimately receive my \$10,000. If it did not, I receive nothing, so to that extent I felt that the reasonable chance I was taking [42—9] with them probably entitled me to more than the usual ten per

(Testimony of M. E. Dittmar.)

cent commission. In the other case where I agreed to ten per cent I believed that if the deal went through in a short time in ninety days or four months or even in six months, I would rather in that case have taken ten per cent than a somewhat larger commission in an indefinite way.

(The witness continuing testified:)

I think that \$10,000 the amount originally agreed upon is still a reasonable fee for my services in view of the deal that was finally consummated. Commissions that are allowed on the sale of mining properties are a variable quantity as a rule. On properties that are more or less prospective in character I should say that ten per cent is absolutely a minimum. I have myself given considerably more than that amount to people who have been instrumental in handling property for me. I have given fifteen per cent contracts, and I know of them being considerably higher. A mining broker is called upon frequently to look into properties that do not meet the expectations of his clients, and it always involves large expense. I myself have had the experience of perhaps examining five and six and eight properties before I would find one that would interest me at all. I have never received any compensation from the Stauffer Chemical Company in connection with this purchase, or from anyone. I wrote to Mr. De Guigne telling him that I expected them to pay that money through the Phoenix Securities Company for me. Therefore while the \$10,000 was added I would get it indirectly from the Stauffer Chemical Company

(Testimony of M. E. Dittmar.)

through the Phoenix Company. Nothing at all was said about the payment of any commission. I discussed that with Mr. Kunze telling him in case they bought [43—10] it in a shorter time that the ten per cent commission would be satisfactory, as I had discussed it with the Phoenix people. That was not necessarily included in the purchase price. The negotiations in that case were indefinite almost to the last minute, but I did not take that subject so very seriously because I did not expect that a ninety day deal would go through.

Cross-examination.

That was reduced to writing and specifically covered in the agreement with the Stauffer Chemical Company and the defendant on May 1st, 1907. I received an acknowledgment of the letter I wrote to Mr. De Guigne the President of the Stauffer Chemical Company under date of April 20th, 1907. I don't know whether I have that. I think it must be with the papers there. I did not follow up that point of securing a contract from the Stauffer Chemical Company referred to in my letter to Mr. De Guigne. I think I saw Mr. Charles Kunze the first time in October in 1906. I went to New York I should judge in about two or three weeks after I met him; I reached New York very early in December. I had business in view in the East, but the other matter that I was going on particularly at that time did not materialize, but while East I went to Boston and formed some connections in copper interests in Boston that I regarded as legitimate. I was

(Testimony of M. E. Dittmar.)

probably ten days or two weeks in New York and Boston, and perhaps a week in Chicago and Milwaukee. I called on Mr. Hatch two or three times. On my first visit to Mr. Hatch I did not mention the Chemical Company at all. The first time that I mentioned the Stauffer Chemical Company was when Mr. Hatch pressed me in his letter to me of February 13th to know who [44—11] the parties were that were behind me. I did not mention the name to Mr. Reif or Mr. Connor. Before going East I may have mentioned what the probable price would be to Mr. Kunze; that is my recollection. I mentioned \$75,000 as a probable price. Mr. Kunze is mistaken in regard to my mentioning the commission to him before I went East. I suggested \$75,000 to Mr. Hatch as the price when I was in New York. I said nothing to him about a commission at that time. I figured that that would be net to them. Mr. Hatch says that \$75,000 had to be net to them. Upon my return from New York I discussed the commission with Mr. Kunze. I did not know Mr. Kunze's position with the Stauffer Chemical Company. Did not know what his attitude was. Did not know whether he was seeking to make a commission out of the deal or where his interest would come, because naturally I presumed he wanted to make some money and consequently to get at the fact I told him that the net price was \$75,000 to the Phoenix Securities Company and any commission made would have to be made above that figure, and I suggested to him that on an eighteen months' bond taking chances with the de-

(Testimony of M. E. Dittmar.)

velopment of the property if it was necessary for me to take care of him in the matter I would want \$100,000 or \$25,000 commission; \$12,500 to me and \$12,500 to him. He told me that he was interested in the transaction with the Stauffer Chemical Company and he wanted to get the best price that he could. Then we debated the question of commission and finally it was understood that \$10,000 would be added to the \$75,000 price made. I did not know that he was acting as a representative of the Chemical Company. I had never up to that time met anybody but Mr. Kunze. I did not know who he represented. He stated to me, [45—12] of course, that the Stauffer Chemical people were his people, but I never met him before, and knew nothing about him at all. I think I knew at that time that the Stauffer Chemical people were the ones who were considering it.

[Testimony of R. C. Lane, for Plaintiff.]

R. C. LANE, a witness called on behalf of the plaintiff, being duly sworn, testified as follows:

I am a broker and have been engaged in that line of business more than ten years. I have been in this vicinity about ten years, and I was in the business previous to that. I have been acting as a broker in the consummation of sale of mining properties during the time mentioned. I am acquainted with the commissions that are usually allowed and the reasonable value of services of brokers in effecting sales of mining property.

Q. I will ask you, Mr. Lane, what, in your opinion,

(Testimony of R. C. Lane.)

would be the reasonable value of the services of a mining broker in effecting the sale of about 20 or 25 full-sized mining claims in the northern part of this State, and more particularly in Shasta County, the ore in the properties being principally copper, and the properties not being on the railroad, but about seven miles off, and connected with the railroad partly by wagon road and partly by trail; the properties being sold by the broker, or rather, a contract being entered into originally by the broker, for a purchase price of \$85,000 on an eighteen months' contract, with an option that they might be taken in three months' time for \$50,000 cash, which agreement was subsequently modified by another agreement by which agreement the sellers secured \$2,500 cash at the time that the substituted agreement was entered into, and \$33,500 in bonds and \$15,000 in cash, making a total of [46—13] \$51,000 with \$15,000 remaining unpaid at the time that the broker made a claim for the reasonable value of his services?

To which question defendant objected upon the ground that the evidence sought to be elicited was immaterial, irrelevant and incompetent, and that no proper foundation had been laid for it, which objection was overruled by the Court and an exception noted on behalf of defendant.

A. The customary way of paying a commission is a certain percentage on the selling price, and that price on a sale of that kind—that commission—ought not to be less than ten per cent, and ordinarily we get more than that for it—of the selling price.

(Testimony of R. C. Lane.)

Q. And also, Mr. Lane, disregarding the particulars of the agreement, that I embodied in the previous question, and bearing in mind simply the nature of the properties that I described, namely, that there were a number of full-sized mining claims, bearing copper ore principally, in the northern part of the State, and situated as I have stated before, what, in your opinion, would be the reasonable value of the services of a broker in securing the sale of those properties, what percentage?

Mr. REDMAN.—We will renew the objection we made, your Honor.

The COURT.—Yes.

Mr. REDMAN.—And your Honor will allow us an exception.

The COURT.—Certainly.

A. Well, I should say not less than ten per cent.

(The witness continuing testified:)

Twenty per cent would be a reasonable commission. [47—14] It is often paid and more. It depends on the amount of work that the broker has to do, and the conditions. A fully developed property of either gold or copper is much harder to sell than one undeveloped. I don't know that the fact that the properties are on a railroad or are remote has any effect on the value of the broker's service in effecting a sale, excepting it is harder to get anyone to look at property a long distance from the railroad than if it were nearby. The more expense and the more trouble a broker is put to, the more commission

(Testimony of R. C. Lane.)

he is entitled to receive. Those things ordinarily are understood in advance about what he is to do and the commission based on that. I should say that twelve and one-half per cent at least was the reasonable value of the services rendered by the plaintiff bearing in mind the properties and the terms of the sale as finally consummated.

Cross-examination.

I don't know why one who is not a broker, but who was engaged in some other business and only incidentally a broker, would not be entitled to the same commission. He would be performing the same work. I would say that he was entitled to the same rate if he simply made one or two sales. If he did not perform the regular services, but simply answered a question or two, I don't know that he would be.

Q. Take a case where a man is a regular broker and I go to him with property to sell and employ him to sell it, give him a contract, and he makes an effort, and after a great deal of time and perhaps money spent, he succeeds in finding a purchaser for the property and there is a sale; then another case where a man goes into a broker's office knowing that the broker had some relation of some kind with [48—15] the owner of the property and asks him to get into communication with the owner with a view of ascertaining what the owner wants and he does it, writes a letter, and the owner says I want so much money and the sale is closed; now, regardless of any

(Testimony of R. C. Lane.)

rule which brokers may have established as to their commission, don't you recognize a distinction in the services rendered—that one is greater than the other? A. Yes, sir.

Q. Now, aside from any rule which brokers may have, wouldn't that make a difference in the amount of the reasonable compensation to be paid in those two cases?

A. I don't think it would. We would have to have some of the cream with the bad.

The COURT.—He is not talking about the “cream” now, he is talking about the value of the services; not what you might be able to get if you got somebody in a tight place, but simply what the value of your services would be in the one case as compared with the other.

A. Of course, you render more services in the first than you do in the second, but they charge the brokerage just the same if they consummate the deal.

Mr. REDMAN.—Q. Eliminating any rule brokers may have about their charges and to get some cream along with the skimmed milk, you do recognize that aside from that, that one is rendering a greater service and therefore should receive more compensation than the other.

The COURT.—Yes, he has said so.

Prior to the trial of the action the depositions of Edward S. Hatch, Frank M. Clute and Henry Cumisky, witnesses produced on behalf of defendant were taken in New [49—16] York pursuant

(Testimony of R. C. Lane.)

to stipulation between the parties. Some of the exhibits, copies of which were annexed to said depositions were read in evidence on behalf of plaintiff, including the agreement of May 1st, 1907, between defendant and the Stauffer Chemical Company (Exhibit 18).

The testimony of said witnesses given upon their said depositions, together with the rest of the exhibits attached thereto were read in evidence on behalf of defendant (it being stipulated that the copies of the correspondence and documents attached to said depositions were true and correct copies of the originals thereof).

The testimony of the said witnesses given upon said depositions and the said exhibits thereto are as follows: [50—17]

[Deposition of Edward S. Hatch, for Defendant.]

EDWARD S. HATCH, a witness produced and called on behalf of the defendant, having been first duly sworn by the Commissioner to tell the truth, the whole truth and nothing but the truth, and being interrogated by counsel, testified as follows:

Direct Examination to Defendant's Counsel.

Q. 1. Are you acquainted with M. E. Dittmar, the plaintiff in this action? A. I am.

Q. 2. Has the plaintiff been to see you at your office in the City of New York? A. He has.

Q. 3. Where is your office, and where was it located when the plaintiff called to see you?

A. My office is at Number 100 Broadway, Borough

(Deposition of Edward S. Hatch.)

of Manhattan, City of New York, at which address my place of business has been located continuously, and since the year 1906 and for a number of years prior to that date.

Q. 4. You are an attorney and counselor at law?

A. Yes, sir.

Q. 5. As a lawyer, have you occupied professional relations to the Phoenix Securities Company, and if so, what, and during what period of time?

A. I have been counsel to the Phoenix Securities Company from about the time of its organization in the year 1905 and believe I am still counsel for that corporation.

Q. 6. Now, do you remember when the plaintiff called upon you at your office at 100 Broadway, in the City of New York? [51—18]

A. Mr. Dittmar called at my office on the 7th day of December, 1906, in the forenoon; told me he was in New York, stopping at the Imperial Hotel, and he spent about half an hour with me talking about things in general but nothing in particular. He spoke about the properties of the Phoenix Securities Company in the west and from his manner I assumed he was going to talk some proposition to me for the Phoenix Securities Company, but he made no proposition up to the time of his leaving, and he said in substance that he would come in again. He spoke about a man named Drake, and I inquired of him particulars of some other persons, of whom he could give me no information, and this is substantially all that took place at that interview.

(Deposition of Edward S. Hatch.)

Q. 7. Did Mr. Dittmar call to see you the next day?

A. No, he did not come into my office the next day, but information reached me that he had called Mr. Reif, the President of the Phoenix Securities Company, and Mr. Reif telephoned my office on the 11th of December, 1906, that Mr. Dittmar had been to see him and had been referred to me and then to Mr. W. E. Connor.

Q. 8. When did Mr. Dittmar call on you?

A. On the 11th of December, 1906, Mr. Dittmar called and saw me and said that he would call upon Mr. Connor on the 12th of December.

Q. 9. At this interview with you on the 11th of December, did Mr. Dittmar make any proposition to you concerning any of the properties of the Phoenix Securities Company? [52—19]

A. No, sir, he did not make any proposition that day, but I believe I said to him that it was for him to make a suggestion of a practical character to the Phoenix Securities Company if he wanted to accomplish anything.

Q. 10. Did Mr. Dittmar see you again after this?

A. Yes, he called upon me again on the 13th of December, 1906, and then apparently disclosed the real purpose of his visit east. It was quite late in the day on the 13th when he called, and he advised me that he had seen Mr. W. E. Connor without any practical result. I do not recall that he used those words, but that was what I understood from what he said, that he had not accomplished anything with

(Deposition of Edward S. Hatch.)

Mr. Connor. He told me that he was leaving that night for California and would return east the latter part of January, or early in February, and that in the meantime he would correspond with me. He said he would correspond with us or with me in respect to the conditions of a bond, and that on those lines we could do as we thought best upon hearing from him. This is substantially all he said about the Summit and Graves and North Mammoth extension properties.

Q. 11. Was there anything said between you and Mr. Dittmar at that interview about a commission to him?

A. There was not. He was apparently making an offer, but he did not invite me to make any proposition to him on behalf of the Phoenix Securities Company. He said he was going to correspond.

Q. 12. When next did you hear from Mr. Dittmar?

A. It was not until the end of January that I next heard from him. [53—20]

Q. 13. Prior to Mr. Dittmar calling upon you in December, 1906, had you sent for him or invited him to come and see you?

A. He came on his own initiative and unsolicited as far as I know.

Q. 14. Well, what was the nature of the communication you received from him at the end of January, 1907?

A. On the 30th of January, 1907, I received from Mr. Dittmar a telegram which I now produce.

DEFENDANT'S COUNSEL.—I offer this tele-

(Deposition of Edward S. Hatch.)

gram in evidence and ask the Commissioner to mark it with the initials H. A. B., Defendant's Exhibit 1, of this date, but to return a compared copy with the testimony, in order that the original may be preserved and not bound up with the record.

The Commissioner marked the telegram "Dfts. Ex. 1, Mch. 25, 1912." A compared copy is annexed to this testimony, similarly marked.

Q. 15. Did you send any reply to Mr. Dittmar to this telegram of his dated January 30, 1907?

A. I did. I sent Mr. Dittmar a telegram on the 31st of January, 1907. I have not the original, of course, as I have not seen it since I sent it to the plaintiff, but I have a record of its contents, which was as follows: "Make proposition on line seventy-five thousand and deposit five thousand security to do two thousand work monthly with definite number men." I confirmed this telegram [54—21] in a letter of the same date, which I sent to Mr. Dittmar, and of which I kept a duplicate copy. I have not seen the original of this letter since I sent it to the plaintiff. I produce my copy, which was a carbon copy stricken off by the same impression that made the original. I hand this copy to the Commissioner.

DEFENDANT'S COUNSEL.—I ask the Commissioner to mark this copy letter with the initials H. A. B., Defendant's Exhibit 2, of this date. I offer it in evidence and ask the Commissioner to return a compared copy thereof with this record.

Original is so marked and the compared copy similarly marked is returned herewith.

(Deposition of Edward S. Hatch.)

Q. 16. Mr. Hatch, have you received a number of letters at different times, subsequent to this, from M. E. Dittmar, the plaintiff? A. I have.

Q. 17. In that way you have become fairly well familiar with his signature? A. I believe I have.

Q. 18. Will you look at the letter I now show you and state whether or not it bears the signature of the plaintiff, and state under what circumstances it came into your possession?

A. The paper now handed to me is signed by the plaintiff, M. E. Dittmar, to the best of my information [55—22] and belief. Although it is addressed to Mr. Charles Kunze, bearing date January 31, 1907, it was received by me at my office through the mails. Subsequently I received a letter from Mr. Dittmar bearing the same date, January 31, 1907, with a memorandum attached under date of February 3, 1907, that it was sent by mistake to another address, from which it appears that the Kunze letter had been sent to me by mistake by Mr. Dittmar.

DEFENDANT'S COUNSEL.—I ask to have this letter, purporting to be signed by M. E. Dittmar, and addressed to Charles Kunze, dated January 31, 1907, marked by the Commissioner with the initials H. A. B., Defendant's Exhibit 3, March 25, 1912, and I offer it in evidence, and request the Commissioner to return a compared copy with this record instead of returning the original.

The letter is so marked and the compared copy is annexed hereto similarly marked.

(Deposition of Edward S. Hatch.)

Proceedings adjourned to 4 P. M. at the same place.

Proceedings continued Monday, March 25, 1912, at 4 P. M. at the same place.

Same appearances.

Proceedings adjourned to Tuesday, March 26, 1912, at 10 A. M. at the same place.

Proceedings continued Tuesday, March 26, 1912, at [56—23] 10 A. M. at 165 Broadway.

Same appearances.

Examination of EDWARD S. HATCH resumed.

Direct Examination to Defendant's Counsel.

Q. 19. Will you now look at the letter I show you bearing date January 31, 1907, purporting to be signed by M. E. Dittmar and addressed to Hatch & Clute, 100 Broadway, New York, with a memorandum under date of February 3, 1907, attached addressed to "Mr. Hatch" and signed "D" and state whether those two papers are the communications mentioned by you and which you received from the plaintiff shortly after the 31st of January, 1907.

A. These are the letters that I referred to in my answer to the last question. The smaller one, dated February 3, 1907, is the memorandum as to the letter having been sent by mistake to someone else.

DEFENDANT'S COUNSEL.—I ask to have these two papers marked with the initials H. A. B., Defendant's Exhibits 4 and 5 respectively, March 26, 1912, and I offer them in evidence, the paper dated February 3, 1907, as Exhibit 4, and the letter dated January 31, 1907, as Exhibit 5, and I ask the Com-

(Deposition of Edward S. Hatch.)

missioner to return compared copies with the record, similarly marked.

The letters are so marked by the Commissioner and compared copies are returned herewith. [57—24]

Q. 20. I now show you a letter bearing date February 7th, 1907, purporting to be signed by the plaintiff and addressed to your firm. Did you receive that from the plaintiff?

A. I did. It is Mr. Dittmar's acknowledgment of the receipt by him of my letter to him of the 31st of January, 1907.

DEFENDANT'S COUNSEL.—I offer this letter in evidence and ask the Commissioner to mark it Defendant's Exhibit 6, March 26, 1912, with the initials H. A. B., and to return a compared copy thereof with the record.

It is so marked and the compared copy is annexed hereto.

Q. 21. I show you another letter bearing date February 18, 1907, and ask you if you received that from the plaintiff? A. I did.

DEFENDANT'S COUNSEL.—I offer this letter in evidence and I ask to have it marked Defendant's Exhibit 7, of March 26, 1912, with the initials H. A. B., and to have a compared copy returned with the record.

The original is so marked and the compared copy is annexed hereto.

Q. 22. I show you another letter bearing date February 19, 1907, and ask you if you received that

(Deposition of Edward S. Hatch.)

from the plaintiff? A. I did. [58—25]

DEFENDANT'S COUNSEL.—I offer this letter in evidence and ask to have it marked Defendant's Exhibit 8, of March 26, 1912, with the initials H. A. B., and have a compared copy returned with the record.

The original is so marked, and the compared copy is annexed hereto.

Q. 23. Mr. Hatch, did you send to Mr. Dittmar any reply to his letters of February 18 and February 19, 1907, which have just been produced and marked?

A. I did. I wrote him under date of February 25, 1907. I have not the original, which I presume is with Mr. Dittmar, but I have a carbon copy, which is made by the same impression that produced the original.

Q. 24. And is this paper which I now show you the copy of your letter of February 25, 1907, to the plaintiff? A. It is.

DEFENDANT'S COUNSEL.—I offer this copy letter in evidence and ask the Commissioner to mark it with the initials H. A. B., of March 26, 1912, Exhibit 9, and to return a compared copy with the record. The paper is so marked, and a compared copy thereof is herewith annexed.

Q. 25. I show you a letter purporting to be signed by M. E. Dittmar bearing date March 6, 1907, and ask you if you received that from the plaintiff.

A. This letter was acknowledged by my partner, Mr. Clute, apparently on March 19, 1907, during my temporary [59—26] absence from the office; but

(Deposition of Edward S. Hatch.)

I personally read it and answered it on the 29th day of March, 1907, now shown me, as appears by lead pencil endorsement of mine on the face of the letter. And the same applies to a letter bearing date March 13, 1907, signed M. E. Dittmar.

DEFENDANT'S COUNSEL.—I offer in evidence the letter of March 6, 1907, and ask to have it marked by the Commissioner with the initials H. A. B., Defendant's Exhibit 10, of March 26, 1912, and to return a compared copy with the record.

The original is so marked and a compared copy is hereto annexed.

DEFENDANT'S COUNSEL.—I ask to have the letter just referred to, dated March 13, 1907, marked in evidence by the Commissioner as Defendant's Exhibit 11, of March 26, 1912, with the initials H. A. B., and to have a compared copy returned with this record.

The original is so marked and a compared copy is annexed hereto.

Q. 26. Will you look at the copy of the letter I now show you and state if you recognize it as an office communication to Mr. Dittmar?

A. I recognize this as the duplicate or carbon copy of Mr. Clute's acknowledgment of Mr. Dittmar's letters of the 6th and 13th of March, 1907. I did not write this particular acknowledgment, as I have stated, but the [60—27] letters were acknowledged by Mr. Clute during my temporary absence from the office; but, on my return, I approved of this communication which Mr. Clute had sent to Mr. Dittmar.

(Deposition of Edward S. Hatch.)

DEFENDANT'S COUNSEL.—I ask to have this copy letter marked Defendant's Exhibit 12, for identification of March 26, 1912, with the initials H. A. B.

It is so marked.

Q. 27. Now, it would appear from Mr. Dittmar's communication to your firm of March 13, 1907, that he enclosed to you with that letter a form of option agreement, and I ask you what, if anything, was done by you or by your office with that form or paper.

A. I caused a draft of the option agreement to be drawn myself, somewhat along the lines of the form sent by Mr. Dittmar, and I wrote him on the 12th of April, 1907, enclosing my draft to him.

Q. 28. I show you a copy letter dated 4/12/1907 and ask you if that is a copy of your letter to Mr. Dittmar enclosing draft option agreement, and being the letter to which you have just referred.

A. This is the carbon or duplicate copy which I retained of the letter in question. The original I presume is in the possession of the plaintiff; this copy was made by the same impression that produced the original.

DEFENDANT'S COUNSEL.—I offer this copy letter in evidence and ask to have it marked Defendant's Exhibit 13, March 26, 1912, with the initials H. A. B., and to have a compared copy [61—28] returned with the record.

The paper is so marked and the compared copy is annexed hereto.

Q. 29. I show you an original letter dated April 20, 1907, signed M. E. Dittmar, and addressed to your

(Deposition of Edward S. Hatch.)

firm, and attached to it a carbon copy of a letter bearing date April 20, 1907, addressed to C. de Guigne, President of the Stauffer Chemical Company, and I ask you whether you received these papers, and from whom.

A. I received these papers from the plaintiff, Mr. Dittmar, and acknowledged them and replied thereto on or about the 26th of April, 1907, in a letter I wrote to Mr. Dittmar, and bearing that date.

DEFENDANT'S COUNSEL.—I offer these letters in evidence and ask to have them marked Defendant's Exhibits 14 and 14a of March 26, 1912, with the initials H. A. B., and ask to have compared copies returned with this record.

The originals are so marked and the compared copies are annexed hereto and similarly marked.

Q. 30. I show you copy letter containing six and a half pages, bearing date 4/26/07, addressed to M. E. Dittmar, and asking you if this is your communication of April 26, 1907, to Mr. Dittmar to which you have just referred, and in which you answered his letter of April 20, 1907?

A. It is. The original I have not seen since I mailed it to Mr. Dittmar, but this is my office duplicate or [62—29] carbon copy produced with the same impression that produced the original.

DEFENDANT'S COUNSEL.—I offer this copy letter of April 26, 1907, in evidence and ask to have it marked by the Commissioner Defendant's Exhibit 15 of March 26, 1912, with the initials H. A. B., and to have a compared copy returned with this record.

(Deposition of Edward S. Hatch.)

The paper is so marked and the compared copy is annexed hereto.

Q. 31. I now show you a telegram and ask you if you received that, and when.

A. This is a telegram I received apparently from M. E. Dittmar on or about the 26th of April, 1907.

DEFENDANT'S COUNSEL.—I offer this telegram in evidence and ask the Commissioner to mark it Defendant's Exhibit 16 of March 26, 1912, with the initials H. A. B., and to annex and return with the record a compared copy thereof.

The original is so marked and a compared copy is annexed to.

Q. 32. I show you a letter dated May 4, 1907, signed M. E. Dittmar, and ask you if you received that letter from the plaintiff.

A. I did. This is Mr. Dittmar's acknowledgment of the receipt of my letter of the 26th of April, 1907, where I sent him a revised form of option agreement.

DEFENDANT'S COUNSEL.—I offer this letter of May 4, 1907, in evidence. I ask to have the [63—30]. Commissioner mark the original with the initials H. A. B., Defendant's Exhibit 17, of March 26, 1907, and to return a compared copy with the record.

The original is so marked and the compared copy is annexed hereto.

Q. 33. Mr. Hatch, referring to the telegram of Mr. Dittmar dated April 26, I ask you whether you caused an option contract or agreement to be type-

(Deposition of Edward S. Hatch.)

written and sent to Mr. Dittmar for execution by the Stauffer Chemical Company.

A. We had an option contract form stricken off and typewritten in accordance with the telegram of April 26th, and this was mailed to Mr. Dittmar on the 27th of April, 1907.

Q. 34. Following this, did you receive on behalf of the Phoenix Securities Company the document which I now show you, bearing the signature of the Stauffer Chemical Company, being option agreement dated May 1st, 1907, and acknowledged before Augusta W. Dinzenberg, Notary Public, May 16, 1907?

A. This is the original option agreement signed by the Stauffer Chemical Company bearing date May 1st, 1907. They had a similar or duplicate of this executed by the Phoenix Securities Company. The Stauffer Chemical Company had the Phoenix Securities Company's signature to their duplicate of their contract, and the Phoenix Securities Company hold this document with the Stauffer Chemical Company signature.

DEFENDANT'S COUNSEL.—I offer in evidence this agreement or option contract dated May 1st, 1907, and ask the Commissioner to [64—31] mark it with the initials H. A. B., Defendant's Exhibit 18 of March 26, 1912.

It is so marked, but defendant's counsel objects to having the original returned with this record, although agreeing to forward the same to the defendant's attorney of record to be produced by him in

(Deposition of Edward S. Hatch.)

open Court on the trial of this case, owing to the fact that the document is voluminous and will encumber the record, as well as being in danger of being mutilated by annexing it to the record and forwarding it through the mails therewith.

Proceedings adjourned to Wednesday, March 27, 1912, at 10:30 A. M.

Proceedings continued Wednesday, March 27, 1912, 10:30 A. M., at the same place.

Same appearances.

Examination of EDWARD S. HATCH resumed.

Direct Examination to Defendant's Counsel.

Q. 35. After the option agreement of May 1, 1907, was executed and exchanged between the Phoenix Securities Company and the Stauffer Chemical Company, what next happened, as far as you know, and when?

A. As far as I know, the Stauffer Chemical Company proceeded to do more or less development work upon the Summit and Graves and North Mammoth Extension properties [65—32] in California under the terms of that option agreement, for the purpose of seeing whether they would exercise the option given them to purchase the property at \$50,000 cash by July 15, 1907, or whether they would purchase it at \$85,000, in eighteen months' time.

Q. 36. Did anyone connected with the Stauffer Chemical Company call upon you during or while development work was being done by them upon the property?

(Deposition of Edward S. Hatch.)

A. On July 16, Mr. C. de Guigne of the Stauffer Chemical Company, the President, I believe, of that concern, called upon me at my office, mentioning that work was being done by his company upon the property, but he made no mention of taking advantage of the \$50,000 cash proposition.

Q. 37. Did Mr. de Guigne make any explanation of his reason for calling upon you on this occasion?

A. Merely that he called while in New York City on his way to Europe.

Q. 38. Well, did you hear after that from the Stauffer Chemical Company, and when?

A. I heard by letter in October, 1907, that they were continuing development work.

Q. 39. What next happened?

A. On December 19, 1907, Mr. Adolph Kunze, connected with the Stauffer Chemical Company, called upon me at my office; after telephoning me from my hotel uptown to advise me that he was in the city. He presented to me some credential or letter from John Stauffer, of the Stauffer Chemical Company, which I have not now at hand, but the substance [66—33] of it was that Mr. Adolph Kunze had full authority to represent the Stauffer Chemical Company. Mr. Adolph Kunze then explained to me that the financial situation in California was in such condition that the Stauffer Chemical Company did not care to continue expending money on the properties of the Phoenix Securities Company in California; that they could not afford to expend the money for

(Deposition of Edward S. Hatch.)

promotion that they had contemplated, even if they found what they had expected to find in the property. He also mentioned what he said was a 50% drop in the value of copper from the time they took the option contract, and that they wanted to change the option contract into some other arrangement or some definite contract.

Q. 40. Did you discuss any new arrangement with him or make any effort to work out some plan along new lines which would be acceptable to the Stauffer Chemical Company?

A. We negotiated together there two or three hours, resulting in a tentative understanding between Mr. Kunze and myself that the property should be conveyed to a new corporation to be organized, and where the total obligation of the Stauffer Chemical Company would be very much less than anything they would have to assume under the original option. The details of this new arrangement were to be reduced to writing in the form of a letter or by correspondence if Mr. Kunze should be able to procure the approval of the Stauffer Chemical Company, and subsequently the details, with some changes and modifications, were reduced to writing and are set forth in a letter which I sent to the Stauffer Chemical Company bearing date the 27th of December, 1907, and this [67—34] letter was dictated in the presence of Mr. Adolph Kunze on the day of its date, and the letter constitutes the written contract and conditions under which the property was act-

(Deposition of Edward S. Hatch.)

ually taken under control by the Stauffer Chemical Company.

Q. 41. What became of that original letter of December 27, 1907?

A. It was sent to the Stauffer Chemical Company and I have never seen it since, but it is probably in the possession of the Stauffer Chemical Company in California, and no doubt can be produced there on the trial of this action.

Q. 42. Did you keep in your office a letter-press copy of this communication to the Stauffer Chemical Company, dated December 27, 1907, and is this the letter-press copy thereof which I now exhibit to you?

A. This is the letter-press copy kept in my office of the communication in question. It is bound up in our letter-press book containing letters of November and December, 1907.

Q. 43. Are you willing to have the Commissioner return this letter-press copy with the record in this case?

A. That I cannot do. The book contains a very large quantity of letter-press copies of letters, but I am willing that the Commissioner may make a true and correct copy from this letter-press copy, and return the same with the record.

DEFENDANT'S COUNSEL.—The Commissioner is requested to make a true and correct copy of this letter, bearing date December [68—35] 27, 1907, and to annex the same to this record as Defendant's Exhibit 19, of this date, and such copy is offered in evidence.

(Deposition of Edward S. Hatch.)

Q. 44. What happened after the making of this new arrangement dated December 27, 1907?

A. A corporation known as the Summit Copper Company was organized. The property known as the Summit and Graves and North Mammoth Extension properties were conveyed to this new corporation, and it did issue stock and bonds generally in accord with the plan specified in the agreement of December 27, 1907.

Proceedings adjourned to 4 P. M.

4 P. M. Proceedings resumed.

Same appearances.

Q. 45. I call your attention to Mr. Dittmar's letter of March 6, 1907, where he states that he was not asking you to pay him a commission, and ask you if you relied upon that statement of his. A. Yes.

Q. 46. I call your attention to the statement of Mr. Dittmar in the same letter that he was taking care of himself, did you also rely on that statement of his? A. Yes.

Q. 47. I call your attention to the further statement of Mr. Dittmar in the same letter that he had an understanding with the parties having the purchase of the property under consideration for a commission, did you also rely upon that statement? [69—36] A. Yes.

Q. 48. Mr. Hatch, referring to the last sentence of your letter to Mr. Dittmar of February 25, 1907, did you understand, as there asserted in substance, that Dittmar was acting for the Stauffer Chemical Company as their agent in the negotiations with you and

(Deposition of Edward S. Hatch.)

not as the agent for the Phoenix Securities Co.?

A. I did.

Q. 49. Mr. Hatch, have you any knowledge or recollection that at any time you asked Mr. Dittmar to act as the agent for the Phoenix Securities Co. or requested him to find a buyer for the property?

A. No.

Q. 50. Mr. Hatch, did the Stauffer Chemical Co. ever complete or carry out the option agreement of May 1st, 1907? A. No.

Q. 51. Did that option agreement remain in force for the term of 18 months specified therein?

A. No.

Q. 52. Did the Stauffer Chemical Co. ever carry out the option contract of May 1st, 1907?

A. No.

Q. 53. As matter of fact, did not the Stauffer Chemical Co. request the cancellation of the May 1st, 1907 option agreement? A. Yes.

Q. 54. Was the May 1st, 1907 option agreement cancelled and the Stauffer Chemical Company relieved of any [70—37] obligation thereunder?

A. Yes.

Q. 55. Did Dittmar have any part whatever in the negotiation for, or in the making of the new arrangement between you on behalf of the Phoenix Securities Company, and the Stauffer Company of December 27, 1907? A. No.

Q. 56. What was the real reason and occasion for the cancellation of the May 1st, 1907, option, and the making of the new agreement of December 27, 1907?

(Deposition of Edward S. Hatch.)

A. The Stauffer Company refused positively to take the Summit and Graves properties under the option of May 1, 1907, but were willing to furnish certain considerations if someone else would make an agreement with our clients that would limit their liability, and the corporation known as the Summit Copper Company entered into a tri-party agreement between our client and the Stauffer Chemical Company for the purchase of the property for something other than cash, and all that our client got out of the original option of May 1, 1907, was, I believe, the sum of \$2,500.

Q. 57. What work and time and study did you personally expend to devise and interest the Stauffer Chemical Company in the new agreement of December 27, 1907, after they had announced their intention to abandon the option?

A. I, with the assistance of my office, expended time continuously for a period of several years, trying to liquidate something out of the Summit Copper agreement at an expense to our client of in round figures, I believe, about \$10,000, with the result that to-day the matter is [71—38]. not complete, nor has the client realized what is due under the Summit Copper-Stauffer agreement.

Q. 58. Was there any object or motive in the plan you worked out in the December 27, 1907 letter, for the organization of the Summit Copper Company and the conveyance of the property to it other than to overcome the refusal of the option holder to carry out the option, and the further purpose of reaching

(Deposition of Edward S. Hatch.)

some agreement which the Stauffer Chemical Company would be willing to carry out?

A. Not to my knowledge.

EDW. S. HATCH.

The foregoing testimony of Edward S. Hatch read over and subscribed to by him before me this 27th day of March, 1912.

[Seal]

H. A. BERGMAN,

Notary Public, King County.

Certificate filed in New York County.

Further proceedings adjourned until March 28, 1912, 10:30 A. M., at the same place. [72—39]

Proceedings continued Thursday, March 28, 1912, 10:30 A. M.

Present: Same attorneys.

[Deposition of Frank M. Clute, for Defendant.]

FRANK M. CLUTE, a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination to Defendant's Counsel.

Q. 1. Mr. Clute, what is your profession?

A. Lawyer.

Q. 2. Are you a member of the firm of Hatch & Clute? A. Yes.

Q. 3. And have you been a member of that firm since the year 1906, continuously? A. Yes.

Q. 4. And down to the present time? A. Yes.

Q. 5. I call your attention to the letters which have been marked in evidence as Exhibits 10 and 11 in this case, bearing date respectively March 6, 1907,

(Deposition of Frank M. Clute.)

and March 13, 1907, signed M. E. Dittmar, and ask you if you received both of those letters in the mails from Mr. Dittmar? A. I did.

Q. 6. Then these letters, Defendant's Exhibits 10 and 11, came into your hands, and what did you do with respect to them?

A. I acknowledged their receipt and laid them aside for Mr. Hatch to answer.

Q. 7. Did you turn them over to Mr. Hatch, or send them in to his office?

A. I placed them on his desk. [73—40]

Q. 8. He was absent, then, from the office, temporarily, at the time? A. He was.

Q. 9. Now, Mr. Clute, in what way did you acknowledge the receipt of these letters from Mr. Dittmar? A. By letter.

Q. 10. I show you Defendant's Exhibit 12 for Identification in this case, being a copy of a letter addressed to M. E. Dittmar, bearing date March 19, 1907. Did you write that letter? A. I did.

Q. 11. Did you send the original letter to Mr. Dittmar? A. I did.

Q. 12. And is this a carbon copy produced by the same impression that produced the original?

A. It is.

DEFENDANT'S COUNSEL.—I offer as Defendant's Exhibit 12 in evidence the document heretofore marked as Defendant's Exhibit 12 for Identification, and I ask to have the Commissioner mark this paper Defendant's Exhibit 12, March 28, 1912, with the initials H. A. B., and to return a copy

(Deposition of Frank M. Clute.)

thereof with the record.

It is so marked and a compared copy similarly marked is annexed hereto.

Q. 13. Mr. Clute, you added something more than a mere acknowledgment to Mr. Dittmar of his communication in [74—41] this letter of yours of March 19, 1907, did you not? A. I did.

Q. 14. What had you noticed in particular with respect to Mr. Dittmar's letter of March 6 or March 13, 1907?

A. When I received the letters, both of which, as I recall it, came to hand on the same date, and not being particularly familiar with the matter, I looked up the press copy of the letter from this office to which Mr. Dittmar referred in his letter of March 6, and noticed that the portion of our letter which he pretended to quote had been misquoted and in my acknowledgment I called his attention to the misquotation.

Q. 15. Now, when Mr. Hatch returned, did you acquaint him with the contents of your letter of March 19, 1907, to Mr. Dittmar?

A. I did. It was attached to the Dittmar letters which were submitted to Mr. Hatch.

Q. 16. Mr. Clute, I call your attention to Defendant's Exhibit 18, in this case, being the option agreement between the Phoenix Securities Company and the Stauffer Chemical Company, bearing date May 1, 1907. Were you familiar with this document? Did you ever have it in your possession?

A. I knew that I read it at one time.

(Deposition of Frank M. Clute.)

Q. 17. You knew of the execution of that document, did you, at or about its date? A. Yes.

Q. 18. Your firm acted on behalf of the Phoenix Securities Company during the year 1907, and following the [75—42] execution of this document, or option agreement, did it not? A. Yes.

Q. 19. And were you familiar with the affairs of the Phoenix Securities Company during all that period of time? A. Oh, generally so, yes.

Q. 20. Do you know whether or not this option agreement was carried out or availed of by the concern who was given this option?

A. I know it was not.

Q. 21. Do you know what was done by the parties to this option agreement with respect to its cancellation or continuance in force?

A. It was cancelled.

Q. 22. Was anything at all paid to the Phoenix Securities Company by the Stauffer Chemical Company under or upon this option agreement of May 1, 1907? A. No, not to my knowledge.

Q. 23. Something has been said about a payment of \$2,500. Was that paid to the Phoenix Securities Company under any document or agreement, and if so, what?

A. It was paid to the Phoenix Securities Company pursuant to the terms of a contract letter dated December 27, 1907, addressed to the Stauffer Chemical Company?

Q. 24. Are you referring now to the agreement of December 27, 1907, with the Stauffer Chemical Com-

(Deposition of Frank M. Clute.)

pany, which has been marked in evidence here as Defendant's Exhibit 19? A. Yes.

Q. 25. You have stated that the original option agreement of May 1, 1907, was cancelled. How was that cancellation [76—43] evidenced or accomplished?

A. By the contract letter, Exhibit 19, above referred to.

Q. 26. What particular provision of that letter have you reference to?

A. The words therein contained as follows, on page 1 of said letter: "The existing contract is to be annulled and no claim made in favor of either party under it."

Q. 27. Are you able to state on what date the \$2,500 referred to in that December 27, 1907, contract was paid? A. On January 15, 1908.

Q. 28. And is that the \$2500 item that is specified as the payment which was to be made in order to bind the proposition contained in the letter of December 27, 1908? A. It is.

Q. 29. Now, Mr. Clute, what did your office do in performance or in the carrying out on behalf of the Securities Company of the provisions of this letter of December 27, 1907?

A. We proceeded with the organization of a corporation under the laws of the State of Maine, by the name of Summit Copper Company, which corporation purchased from the Phoenix Securities Company the properties covered by the contract and issued in payment thereof stock and bonds, the

(Deposition of Frank M. Clute.)

bonds being secured by a mortgage or deed of trust.

Q. 30. That is, the properties in question were conveyed to the Summit Copper Company by the Phoenix Securities Company.

A. That is right. [77—44]

Q. 31. And the Summit Copper Company then mortgaged the properties to a trustee to secure an issue of bonds? A. Yes.

Q. 32. And was the stock of the Summit Copper Company issued also in payment or in part payment for the property? A. Yes.

Q. 33. Under the arrangement evidenced by this letter of December 27, 1907, who received the stock of the Summit Copper Company?

A. It was all turned over to the Stauffer Chemical Company or the individual stockholders of that Company.

Q. 34. Now, what was the amount of the bond issued by the Summit Copper Company?

A. \$37,500, that is my best recollection.

Q. 35. Now, what other document did the Summit Copper Company execute or give at the time of the transfer of the property to it?

A. What we have designated a tonnage agreement, providing for the payment by the Summit Copper Company to the Phoenix Securities Company of a royalty of fifty cents a ton on all ore mined and shipped from the property in question up to a gross sum of \$45,000, according to my best recollection.

Q. 36. Was this Summit Copper Company an en-

(Deposition of Frank M. Clute.)

tirely separate and independent corporation, organized? A. It was.

Q. 37. What year was it organized in?

A. 1908. [78—45]

Q. 38. Now, Mr. Clute, these bonds that you have spoken of aggregated, you say, the sum of \$37,500?

A. Yes.

Q. 39. And by whom were they received?

A. Phoenix Securities Company.

Q. 40. This sum represents the entire issue of bonds of the Summit Copper Company, does it not, \$37,500? A. It does.

Q. 41. Do you know by whom the \$2,500 cash you have referred to was paid?

A. The Stauffer Chemical Company.

Q. 42. What, if anything, did the Stauffer Chemical Company bind itself to do with respect to any of these bonds?

A. The Stauffer Chemical Company guaranteed the payment of these bonds to the extent of \$22,500.

Q. 43. Then that \$22,500 obligation, together with the \$2,500 cash paid by the Stauffer Chemical Company to bind the December 27, 1907 agreement, was all that the Stauffer Chemical Company obligated itself absolutely to pay in this entire transaction under the new arrangement, is that true?

A. That is true.

Q. 44. If they had availed themselves of the option agreement of May 1, 1907, what would they have been required to pay for the property?

A. \$85,000.

(Deposition of Frank M. Clute.)

Q. 45. Did you have any talks or conferences or communications with the plaintiff in this case, Mr. Dittmar, in connection with this arrangement which thus limited the obligation of the Stauffer Chemical Company? [79—46] A. I did not.

Q. 46. Or your office? A. No.

Q. 47. Was there any other reason or motive, so far as you know, for adopting this plan specified in the December 27, 1907 agreement, other than to overcome the refusal of the option holder to exercise the original option and the further purpose of reaching some agreement which the Stauffer Chemical Company would be willing to carry out?

Q. 48. Referring to the \$37,500 of bonds, what was the due date of those bonds, Mr. Clute?

A. \$2,500 on March 1, 1908, without interest; \$2,500 on May 1, 1908, without interest; \$2,500 on July 1, 1908, without interest; \$5,000 on January 1, 1909, with interest; \$10,000 on January 1, 1910, with interest; \$15,000 on January 1, 1911, with interest.

Q. 49. Those were the dates respectively on which the bonds fell due? A. They were.

Q. 50. According to their terms. A. Yes.

Q. 51. Now, which of these bonds was it that the Stauffer Chemical Company guaranteed, the first \$22,500? A. Yes, that is my recollection.

Q. 52. Mr. Clute, do you know what payments were actually made by the Stauffer Chemical Company upon any of these bonds which you have described or upon the tonnage agreement made by the Summit Copper Company? A. Yes. [80—47]

(Deposition of Frank M. Clute.)

Q. 53. Were the payments made to the Phoenix Securities Company? A. No.

Q. 54. To whom were they made?

A. The creditors of Phoenix Securities Company to whom the bonds and tonnage agreement had been assigned.

Q. 55. Did you at all times remain in charge of the collections, you or your firm? A. Yes.

Q. 56. Then please state what the payments were.

A. \$33,500 was paid on the bonds at the following dates and in the following installments: April 6, 1908, \$2,500; May 13, 1908, \$2,500; July 6, 1908, \$2,500; December 28, 1908, \$5,000; July 1, 1909, \$7,000; January 4, 1910, \$7,000; June 29, 1910, \$7,000. In respect to the payment of January 4, 1910, an explanation should be made. At different times prior thereto the Stauffer Chemical Company had made payments of interest which prior to January 4, 1910, amounted to \$1,200 in the aggregate. A claim was made by it, the Stauffer Chemical Company, that the total sum so paid as interest should be credited on account of principal under the agreement of December 27, 1907, and the claim was allowed and the money so received as interest was credited as a payment of principal and the Stauffer Chemical Company paid \$5,800 cash in addition thereto making in all \$7,000, the amount of the January 4, 1910 payment. These total payments aggregate \$33,500, the remaining \$4,000 of the face of said bonds having been allowed to said Stauffer Chemical Company in consideration of it agreeing to pay the balance [81—48] of bonds on which it

(Deposition of Frank M. Clute.)

was not a guarantor, and upon some adjustment. The tonnage agreement was liquidated in July, 1911, between its then holder and owner, being an assignee of one of the creditors, at the sum of \$30,000 for which the Summit Copper Company gave its notes, \$5,000 each, first payable on August 1, 1911, which was duly paid and \$25,000 of which still remained unpaid and undue. The remaining \$25,000 is due in installments of \$5,000 on the 7th day of July in the years, 1912, 1913, 1914, 1915, and 1916 respectively.

Q. 57. Well, Mr. Clute, has there ever been as much as \$75,000, then, for these properties that were involved in this December 29, 1907 agreement?

A. No.

Q. 58. It has been stated that this present case of the plaintiff here was commenced on or about the 28th of December, 1908; prior to that date, what did the payments which you have enumerated were made upon the bonds, amount to?

A. Prior to that date, \$7,500 on bonds, and \$450 received as interest but afterwards credited to principal as above stated.

Q. 59. Was that all that had been paid to any concern or creditor or assignee on account of those bonds, is that right? A. Up to that date.

Q. 60. And nothing had been paid on the tonnage agreement specified in the December 27, 1907, agreement prior to December, 28th? [82—49]

A. Nothing.

Q. 61. I think you mentioned there was a payment of bonds on December 28, 1908?

(Deposition of Frank M. Clute.)

A. Yes.

Q. 62. What did that amount to?

A. \$5,000 for principal and \$450 for interest afterwards credited to principal as above stated.

Q. 63. Was any part of the \$4,000 allowance deducted at that time, or was it subsequently?

A. Subsequently, I believe.

Q. 64. So that the Stauffer Chemical Company took up all the bonds at \$4,000 less than their face, is that right? A. Yes.

Q. 65. And prior to December 28, 1908, they had only taken up \$7,500 worth?

A. That is all, as before stated.

Q. 66. And altogether, from and subsequent to the 28th of December, 1908, they paid only \$26,000 for what they took up?

A. That is correct, which included the \$1,200 transferred from interest to principal as before stated.

Q. 67. And that disposed of the bonds?

A. It did.

Q. 68. And there still remained the tonnage agreement which was not liquidated until the year 1911? A. Yes.

Q. 69. And that was liquidated for \$30,000?

A. Yes. [83—50]

Q. 70. Were there any legal services and disbursements rendered in connection with the efforts to collect these various amounts from the Stauffer Chemical Company?

A. There was an immense amount of time occupied

(Deposition of Frank M. Clute.)

in negotiations by correspondence respecting the payment of the bonds as maturity thereof approaches, and very important consultations, including three trips to San Francisco, two by Mr. Hatch and one by myself, resulting in the payment of a larger sum of money by the Stauffer Chemical Company than it has originally bound itself to pay, and also involving the liquidation of the tonnage agreement at a fixed amount, which up to the date of said liquidation was not in a practical condition to show any financial result.

Q. 71. Now, then, as far as the tonnage agreement is concerned, which originally was made for a total amount of \$45,000, that depended entirely upon the mining of ore in the property? A. It did.

Q. 72. And what was the obligation, if any, of the Stauffer Chemical Company with reference to the tonnage agreement?

A. That its terms were fulfilled, and when I was in San Francisco in July, 1911, the officers of the Stauffer Chemical Company stated to me that up to that time they had found nothing that they believed from the condition of the adjoining properties, that this mine would at some time in the future show results.

Q. 73. Had the Stauffer Chemical Company assumed any obligations in respect to that tonnage agreement, other [84—51] than to agree that the Summit Copper Company would comply with its terms? A. That is all.

Q. 74. And that called for no payments of money

(Deposition of Frank M. Clute.)

except upon condition that ore was mined and shipped?

A. Yes. That is all to my recollection which was to be paid Phoenix Securities Company or its assigns.

Q. 75. So far as you know, was any ore mined or shipped? A. None at all.

Q. 76. Now, then, as to that tonnage agreement, the Stauffer Chemical Company on the liquidation of it has paid to date only \$5,000? A. That is all.

Q. 77. And that \$5,000 was paid in the year 1911?

A. August 1st.

Q. 78. And that makes the total amount paid by the Stauffer Chemical Company on either bonds or tonnage agreement, \$41,000 to this date?

A. Yes.

Q. 79. And unless in the future they take up and pay \$5,000 additional notes, each for the sum of \$5,000, and which covered a period from the present time up to the time 1916, their total expenditures to date amount to \$41,000? A. That is correct.

Q. 80. And if they take up the additional outstanding notes in the future, until the last of them is paid, they will have expended a total sum of \$66,000, is that so? A. That is correct. [85—52]

Q. 81. Then, even if the Stauffer Chemical Company completes everything that it is under obligation to pay or perform in this matter, it will not have paid a total sum of \$75,000 for the property?

A. It will not.

FRANK M. CLUTE.

(Deposition of Henry Cumiskey.)

The foregoing testimony of Frank M. Clute read over and subscribed to by him before me this 29th day of March, 1912.

[Seal]

H. A. BERGMAN,
Notary Public, Kings County.

Certificate filed in New York County. [86—53]

[Deposition of Henry Cumiskey, for Defendant.]

HENRY CUMISKEY, a witness called on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination to Defendant's Counsel.

Q. 1. Mr. Cumiskey, are you the Treasurer of the Phoenix Securities Company? A. Yes, sir.

Q. 2. Mr. Cumiskey, the agreement between the Phoenix Securities Company and the Stauffer Chemical Company, evidenced by Defendant's Exhibit 19 in this case, being the letter of December 27, 1907, called for a cash payment of \$2,500 to be paid down by the Stauffer Chemical Company to the Phoenix Securities Company to bind the proposition specified in that letter. Was any other money, to your knowledge, paid to the Phoenix Securities Company other than that \$2,500 by the Stauffer Chemical Company?

A. No, sir.

HENRY CUMISKEY.

The foregoing testimony of Henry Cumiskey read over and subscribed to by him before me this 28th day of March, 1912.

[Seal]

H. A. BERGMAN,
Notary Public, Kings County.

Certificate filed in New York County. [87—54]

**Defendant's Exhibit 1 [Telegram, January 30, 1907,
M. E. Dittmar to Edw. S. Hatch.]**

March 25, 1912.

POSTAL TELEGRAPH.

Postal Telegraph Commercial Cable System.

COMMERCIAL CABLES.

Clarence H. Mackay, President.

TELEGRAM.

Registered Trade-Mark. Design Patent No. 36369.
The Postal Telegraph-Cable Company (incorporated) transmits and delivers this message subject to the terms and conditions printed on the back of this blank.

36Sf Ka 12 1250a

Redding Cal Jan 30-7

Received at

(Where any reply should be sent)

Edw S Hatch

Care Hatch and Clute, 100 Bway Newyork
Reliable parties ready to consider summit and adjoining property price terms named answer

M. E. DITMAR. [88—55]

Defendant's Exhibit 2 [Letter, 1-31-1907, Hatch & Clute to M. E. Dittmar].

Mar. 25, 1912.

1-31-1907.

Re Phoenix Sec. Co.

M. E. Dittmar, Esq.,

Redding, Calif.

This morning we received your telegram which

reads as follows "reliable parties ready consider Summit and adjoining properties, price terms named. Answer." After looking up a memorandum we made of our interview with you a couple of months ago and conferring with those largely in interest, we wired you as follows— "Make proposition on line \$75,000 deposit five security to do two thousand work monthly with definite number men."

As that is really on the same lines as was agreed upon with you when you were here, we are frank to say we were a little mystified as to the necessity of your wire but presume you had your own reasons for doing so.

Of course we cannot technically name all the terms and conditions in the telegram, or do more than pass on a proposition with terms and conditions, for that requires the formal act of the Board. But your ideas were so much in accord with ours when you were here, that we have no doubt of the acceptance of any fair proposition you make on those lines, with \$75,000 as the price of Summit & Graves and Mammoth extension, which we believe are the technical [89—56] names of what you term Summit and adjoining properties. That so far as the minor conditions of the agreement, bond and lease are concerned, we believe you will submit anything but what is fair and if we are right there will be not few changes required, we are quite certain.

At any rate, we did the best we could so far as wiring is concerned and trust we will have a letter

from you crossing this, and with very kind regards,
remain, dear sir,

Faithfully yours,

(Sgd.) HATCH & CLUTE.

L. M. G. [90—57]

**Defendant's Exhibit 3 [Letter, January 31, 1907,
M. E. Dittmar to Charles Kunze].**

March 25, 1912.

Subscription rates: \$2.50 per year; \$1.50 for six
months. Advertising rates on application.

(Cut)

MINERAL WEALTH PUBLISHING CO.

M. E. DITTMAR, Editor.

Redding, Cal., Jan. 31, 1907.

Mr. Charles Kunze,

1439 Oak St.,

San Francisco, Cal.

Your two wires received. I wired you last evening stating that conditions for taking the people over the ground were not of the best as yet—no doubt a greater part of the ground is still covered quite thoroughly with snow but we have had considerable rain during the past few days that has helped to clear the snow from the higher altitudes and it may be possible when the clouds next lift that the South and East slope of the mountains, at least, will be cleared of snow.

It may be rather awkward for me to go to the property with you. In a case of that kind I should suggest that Mr. Graves accompany you on your trip. I must make a visit to the Afterthought Mine just as

soon as the weather conditions will permit and may leave tomorrow. In that [91—58] event I will not get back to Redding before Monday or Tuesday. If I should go tomorrow and you could postpone your trip two or three days I could arrange to go with you on my return.

The Phoenix people want \$2000 a month expended on exploration and they seem to consider it essential to put up a forfeit with the Bank that this amount be expended. I have written to them suggesting that as long as we are dealing with reliable parties that a provision calling for a continuous employment of six or eight men with a forfeit clause in case the amount of work represented by these men is not done would be sufficient protection under the circumstances. My communication will probably reach them by the time your people would be ready to deal if they will be satisfied with the conditions otherwise and we can then take the matter up by telegraph to a certain extent.

Yours very truly.

M. E. DITTMAR. [92—59]

**Defendant's Exhibit 4 [Letter, February 3, 1907,
"D" to Mr. Hatch].**

March 26, 1912.

Subscription rates: \$2.50 per year; \$1.50 for six months.

Advertising Rates on Application.

MINERAL WEALTH PUBLISHING CO.

M. E. DITTMAR, Editor.

W. D. EGILBERT, Bus. & Adv. Mgr.

(Cut)

Redding, Cal., Feb. 3, 1907.

Mr. Hatch.

The enclosed letter was sent by mistake to another address. Parties due here today but it is storming so do not know whether we can visit mine tomorrow or not.

D. [93—60]

**Defendant's Exhibit 5 [Letter, January 31, 1907,
M. E. Dittmar to Hatch & Clute].**

March 26, 1912.

Subscription rates: \$2.50 per year; \$1.50 for six months.

Advertising rates on application.

(Cut)

MINERAL WEALTH PUBLISHING CO.

M. E. DITTMAR, Editor.

Redding, Cal., Jan. 31, 1907.

Messrs. Hatch & Clute,

100 Broadway,
New York.

Gentlemen:

I wired you yesterday as follows: "Parties ready

to consider Summit and adjoining properties. Price and terms named. Answer."

To-day I received your reply dated January 31 as follows: "Make proposition on lines \$75,000, deposit \$5,000 security to do \$2,000 work monthly with definite number of men."

I expect the parties here to look into the matter within a few days and will then see how the proposition will stand. An engineer is coming with them who has already been over the ground and was very favorably disposed toward it. I had informed this engineer what would be the figures and terms but said that the proposition would be for a working bond, that is, the parties taking the option would agree to keep a certain number of men continuously employed and failing in this would forfeit the option. [94—61].

This has been the usual line of dealing on prospective properties on the Shasta County belt and as we will be dealing with reliable parties, or I would not take up the matter at all, you would be perfectly safe in making a provision say for the employment of six or eight men continuously during the life of the contract and failing to employ such a force on exploration the contract would be immediately forfeited together with all work performed and money expended by the parties who hold the option.

I cannot state anything definite regarding these matters for several days and this letter will probably reach you before anything definite can be arrived at. Under the circumstances you will under-

stand if some modifications of your telegram are necessary.

You will understand, of course, that 18 months is the time required for exploration purposes before paying for the property. I may say in this connection that in all probability diamond drilling will be employed to explore the ground. This will involve the expenditure of at least \$2,000 a month but the parties in view will no doubt prefer a provision stating that a certain number of men be continuously employed and allow them to use their own discretion as to the method of employing them. Until *such that* a diamond drill could be installed it would not be possible to expend \$2,000 a month to advantage—you may be hampered in closing the deal for some little time on account of unusually heavy snow in the mountains during this month and which had not entirely disappeared.

Yours truly,

M. E. DITTMAR. [95—62]

**Defendant's Exhibit 6 [Letter, February 7, 1907,
M. E. Dittmar to Hatch & Clute].**

March 26, 1912.

Subscription rates: \$2.50 per year; \$1.50 for six months.

Advertising rates on application.

(Cut)

MINERAL WEALTH PUBLISHING CO.

M. E. DITTMAR, Editor.

W. D. EGILBERT, Bus. & Adv. Mgr.

Redding, Cal., Feb. 7, 1907.

Messrs. Hatch & Clute,

100 Broadway,

New York, N. Y.

Gentlemen:

Yours of January 31st, received and contents noted. The people who have in view the taking up of the Summit, the Graves and North Mammoth Extension properties have been looking over conditions for a number of days. A Mr. Kunze who represents the people mentioned in the deal is very favorably impressed. He is himself a practical mining man and engineer. Another one of the parties accompanied Mr. Kunze on his visit to the properties.

Mr. Kunze suggested that they should have a little more time than 18 months for exploration and he sets the time at about two years. I have been contending that 18 months would give them ample opportunity for [96—63] exploration but it may

be necessary to compromise a little on this point and add two or three months to the time suggested.

My object in wiring to you was to ascertain if the property was still open for I have no way of knowing but what you may have considered some New York buyers as different interests have from time to time figured on taking the property over for exploration purposes.

In the course of a few days or as soon as I hear more definitely I will draw up a memoranda of agreement setting forth the different provisions desired in the bond and forward a copy to you and you can make any alterations that you wish and in this way we can probably cover all points by mail in a comparatively short time.

Will you kindly inform me as to the condition of titles and it may be well to express your Abstract of Title to this property to me then I can have the abstract brought down to date and everything will be in readiness for the examination of the attorneys representing the bonding parties.

Yours very truly,

M. E. DITTMAR. [97—64]

**Defendant's Exhibit 7 [Letter, February 18, 1907,
M. E. Dittmar to Hatch & Clute].**

March 26, 1912.

Subscription rates: \$2.50 per year; \$1.50 for six months.

Advertising rates on application.

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MINERAL WEALTH PUBLISHING CO.

M. E. DITTMAR, Editor.

W. D. EGILBERT, Bus. & Adv. Mgr.

Redding, Cal., Feb. 18, 1907.

Messrs. Hatch & Clute,
100 Broadway,
New York.

Dear Sirs:

Yours of the 13th inst. received and has my consideration. The people who have in view the development and purchase of the Summit, the Graves and the North Mammoth Extension property are the Stauffer Chemical Company interests of San Francisco. You will have no difficulty in determining the responsibility of these interests as they are a very strong concern and their holdings extend to all parts of the Pacific Coast. They are willing to pay \$75,000 for these properties in eighteen months from the date of entering into an agreement. They are willing to put eight men to work on exploration beginning the 1st of April and keep them on continuously thereafter or failing to do this will forfeit their contract.

I succeeded in getting them to consider eighteen [98—65] months sufficient time for exploration, and they have receded from the request for two years, but they do not wish to deposit a forfeit in case they do not carry out their contract, they considering that the forfeiture of all work done would itself be of considerable value and as long as they agree to keep a force of eight men continuously employed, taking into consideration the responsibility of the parties desiring to purchase, that this in itself will be ample evidence of good faith.

I expect the engineer representing the Stauffer Chemical Co. this evening or tomorrow and will then draw up a skeleton agreement and forward to you for the approval of the Board of Directors of the Phoenix Securities Company. On investigation I find that the Abstract of Title is here in the hands of your former attorney, Mr. George C. Perry, and we can have this brought down to date for the satisfaction of the parties taking the bond. My commission in the deal will amount to \$10,000 and as the buyers know your price and understand that I am to receive a commission of \$10,000 when the deal is consummated, it will no doubt be best to make the transfer direct from the Phoenix Securities Co. to the Stauffer Chemical Company and at the same time to give me an agreement for \$10,000 and authorize the Bank of Shasta County holding the escrow papers to receive \$75,000 for your credit and the remaining \$10,000 for myself. Hoping that this will be satis-

factory and that we can reach an early conclusion, I remain,

Yours very truly,

M. E. DITTMAR. [99—66]

**Defendant's Exhibit 8 [Letter, February 19, 1907,
M. E. Dittmar to Hatch & Clute].**

March 26, 1912.

Subscription rates: \$2.50 per year; \$1.50 for six months.

Advertising rates on application.

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MINERAL WEALTH PUBLISHING CO.

M. E. DITTMAR, Editor.

E. D. EGILBERT, Bus. & Adv. Mgr.

Redding, Cal., Feb. 19th, 1907.

Messrs. Hatch & Clute,

100 Broadway.

New York.

Gentlemen:

I have requested the Bank of Shasta County to advise you as to the standing of the Stauffer Chemical Company, mentioned to you in my letter of yesterday, as to the parties desirous of taking the bond on your property in the vicinity of the Mammoth mine. No doubt this information will reach you about the same time that this communication does.

I received a letter from the engineer operating for the Stauffer Chemical Company, today. He is at the present time surveying in the district where the

property is located, and I will not be able to go into details with him further than mentioned in my letter of yesterday, until [100—67]. he returns to Redding. He requests, however, that a clause be put in the bond giving the Stauffer Chemical Company a right to purchase the property outright by paying \$42,500 within ninety days. I discussed this question with Mr. Bush of the Bank of Shasta County, and he concurs with me that if you wish to consider such a clause make the buyers a proposition that if they will pay \$50,000 in ninety days, that the same will be accepted. So far as commission is concerned under this proposed clause it can be left in the same proportion as under the general terms of the bond. I believe that the clause on a \$50,000 basis will be a good one to insert, so far as the selling interests are concerned, and would be seriously considered by the buying interests within the ninety days given.

As soon as you have had time to bring my communication of yesterday, and this letter, to the attention of the parties in interest, wire me as to your views of the case. If the ninety day clause is satisfactory on a \$50,000 basis, wire me the counter proposition mentioning that sum, just as though the proposition for \$42,500 had been laid before you without any suggestion on my part.

Yours very truly,

M. E. DITTMAR. [101—68]

**Defendant's Exhibit 9 [Letter, February 25, 1907,
Hatch & Clute to M. E. Dittmar].**

March 26, 1912.

February 25th, 1907.

RE PHOENIX SECURITIES CO.

M. E. Dittmar, Esq.,
Redding,
California.

We are in receipt of your esteemed favors of the 18th and 19th by mail this morning, one following the other in an hour, and we hasten to acknowledge the receipt of the letters, and express to you what we imagine will in substance be the formal answer that we will make to those letters, after we have heard from some of the parties in interest who are out of the city, and with whom we must consult before we formally answer your letters.

In the first place, we are very confident that our clients will not pay a commission to exceed ten per cent. of the amount which they receive in cash or kind, and only when they receive it, and that deducted from that ten per cent. must be any other expenses incident to the transaction, so that the client will net out of any sale at least ninety per cent. of the purchase money or price.

We will cause to be investigated the final standing of the Stauffer Chemical Co. and must be reasonably satisfied thereof, and of the value of their signature to the contract, before we are willing to waive a deposit of some sort; whether it will be forfeit or not, we do require a [102—69] substantial deposit, un-

less the name subscribed to a contract is as good as money in a practical sense.

We should also want any Chemical Company to produce evidence of the authority of the officer subscribing a contract to purchase a mining property, inasmuch as ordinarily at least a Chemical Company would not have authority to speculate in mining properties.

We do not believe that our clients will be willing to name any price in any option less than \$75,000 under any conditions whatsoever, but that does not mean, and we imagine the Stauffer Chemical Co. will fully appreciate the suggestion, that if they within ninety days see fit to make a reasonable proposition for a discount from \$75,000 for cash that our clients might not consider it, but we are positive they would never consider such a discount as mentioned in your letters as being reasonable, but that question can be taken up for discussion at the time a real proposition is made to us to discount the option.

We should want a provision in any contract that did not provide for a forfeit that the ore extracted should be reduced with reasonable promptness to cash, and the cash deposited in the Bank of Shasta County, pending the determination by the proposed purchasers whether they would take up the option or not.

Of course if they took the option the deposit would belong to them. If they failed to take it up or broke their contract it would belong to us.

A very clear clause would have to be inserted in the contract, providing for the element of time, and

the number [103—70] of men kept to work, and the importance of that consideration to our clients, in making such a contract as we think is contemplated for the purchase of this property.

And by the way we should want a provision in the contract that would provide for a deposit of \$15,000, which, however, would have a string to it reading that the same should *not deposited* by the Stauffer Chemical Co. so long as they carried out the terms of the contract, and no other party or parties were associated with them in carrying out the contract, or substituted for them as assignees or otherwise.

In other words, we are unwilling that any contract should provide for a direct or indirect assignment of this contract, or its performance by any assignee, directly or indirectly, unless a large deposit is made, which we recognize is practically a prohibitory provision as against any assignee of the contract.

Please don't understand that we are opposed to the making of this contract or shall put any obstacles in the way of our clients agreeing with the Stauffer Chemical Co. on a fair and reasonable contract, but on the other hand we want to frankly and promptly advise you that before we shall advise our clients to give up for eighteen months any opportunity to sell their property that our clients shall be protected in every reasonable way against the Stauffer Co. changing their minds, or placing us in a position which is not anticipated in their present negotiations through you with us. [104—71]

We think if the Stauffer Co. will draft, or cause to be drafted, a contract on the lines that are agree-

able to them, bearing in mind our suggestions, that then we can change those so far as they require additions or alterations, and we have no doubt it will be very easy to agree on the final phraseology before the first of April.

In conclusion, permit us to state we understand your second letter in relation to the discount is intended by the Stauffer Co. simply as a privilege to us, and not a variation of their negotiations through you to purchase at \$75,000 on an eighteen months' contract.

We remain, dear sir,

Faithfully yours,

ALB. (Sgd.) HATCH & CLUTE. [105—72]

Defendant's Exhibit 10 [Letter, March 6, 1907, M. E. Dittmar to Hatch & Clute].

Subscription rates: \$2.50 per year; \$1.50 for six months.

Advertising rates upon application.

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MINERAL WEALTH PUBLISHING CO.

M. E. DITTMAR, Editor.

W. D. EGILBERT, Bus. & Adv. Mgr.

Recd. 3/16/07

FMC.

Ans. 3/29/07

ESH.

Ack. 3/19/07

Redding, Cal. March 6, 1907.

FMC.

Messrs. Hatch & Clute,

100 Broadway,

New York, N. Y.

RE PHOENIX SECURITIES CO.

I am in receipt of your communication of February 25th and I have discussed the substance of your letter with parties in interest.

You state that you are not "very confident that our clients will not pay a commission to exceed 10% of the amount which they receive in cash or kind." I wish to state that I am not expecting you to pay me a commission of 10% on the purchase price of \$75,000. I am taking care of myself over that amount and have an understanding with the parties having the purchase of the property under consideration for a commission of \$10,000 when the sale is [106—73] concluded. Now I suggest that the transaction be made direct between the Phoenix Securities Co. and the Stauffer Chemical Co. for \$85,000—not \$75,000—and that you receive the full \$75,000 cash for the property and give me an agreement to pay the remaining \$10,000 to me when the money is finally paid and the transfer concluded. It seems to me that this is a fair proposition as that amount of money is not a large sum to receive for bringing about a mining deal of the magnitude under consideration.

In case the parties taking the bond and make an offer to conclude the deal in 90 days or so and under the circumstances receive a discount on the purchase price then I will be willing in that case, to receive 10% of whatever amount is agreed upon. You will agree with me that this proposition is eminently fair to all concerned.

You state that you will cause to be investigated

the financial standing of the Stauffer Chemical Co. I wish to state that this is one of the prominent manufacturing concerns of California. It owns a plant at Stege, Cal., another at Bay and Dupont Sts. in San Francisco, another at Utah and Alameda Streets, San Francisco, and is building a large new sulphur subliming works at Oakland, Cal. You mention also the Company's authority to purchase mining property. As minerals enter very largely into the chemicals produced by this corporation they have, under their charter, the right to own mining properties. For instance the Company own a large iron pyrite mine near Berkeley, Cal., a borax mine in the Southern part of the State, a phosphate mine in Wyoming and a tungsten mine near Randsburg, Cal. [107—74] In addition to this the Company has recently acquired some cinnabar holdings in Monterey County. These facts you can readily ascertain. No doubt if you cause your Bank to wire to its San Francisco correspondent you will receive all the information you desire regarding the responsibility of the people that I represent.

The proposition of paying \$42,500 within 90 days is more or less in the nature of a cash offer. You will understand that your properties in this mineral district are not developed and while the probabilities for development are good they are wholly prospective in character. Under the circumstances the price, even at that figure, is a good one if it would be paid down at this time but as they put the payment off for 90 days it would of course, mean that they would have some advantage of development in the

meantime and consequently I think that a counter proposition of \$50,000 may suit them, and this may be productive of results.

It is doubtful whether the value of the stock and bonds in addition to the cash that was received for all these properties would reach $\frac{1}{2}$ of the figure suggested under the 90 day option, and as your Company has done practically nothing to develop the property since then you will appreciate that I consider the proposition a fair one or otherwise I should never have consented to sell in the first place to the Phoenix Securities Co. for the amount that we, the original owners of the properties, received.

The proposition that you suggest regarding the reduction of ore is to a certain extent impracticable, [108—75] because the properties are connected with the railroad by means of a trail only and transportation would be practically prohibited. In any event the parties taking the bond should not be expected to deposit more than the net result after extracting and treating the ore and marketing the product. This then could apply on the purchase price or revert to the Phoenix Securities Co. as the case may be.

Regarding the element of time and the number of men kept at work, I fully agree with you on that point and in the proposition for a large deposit in case the Stauffer Chemical Co., assigned its contract will also be satisfactory although it may be well to qualify this so that permission can be given to assign by the Phoenix Securities Co. after investigating the parties interested in the transaction.

Of course you will understand that the Stauffer Chemical Co. desires first to develop the property before purchasing it—that is the object of an 18 months bond. The ground as it stands at present has only speculative value to the Stauffer Chemical Co. people but they are willing to spend a good many thousand dollars to investigate its real value. When they fail to keep the requisite number of men at work they will, of course, forfeit their contract. I enclose a skeleton of a contract along the lines that I consider fair to all concerned. As soon as you receive it if it meets with your approval in a general way I will appreciate a response by wire in order that I may at once notify the parties desiring to spend their [109—76] good money in making this property what I hope it will ultimately be, a valuable addition to the Shasta County Copper Belt.

Yours very truly,

M. E. DITTMAR,

Will forward contract form later. [110—77]

Defendant's Exhibit 11 [Letter, March 13, 1907, M. E. Dittmar to Hatch & Clute].

Ack. 3/19/07. FMC. ANS. 3/29/07. ESH.

March 26, 1912.

Redding Cal. March 13th, 1907.

Messrs. Hatch & Clute,

100 Broadway,

New York.

Gentlemen:

I enclose herewith a form for option and contract or agreement which we are considering for negotiations between the Phoenix Security Company and

the Stauffer Chemical Company.

After considering all the points you suggest and considering all points that probably have a bearing upon such an agreement, I have drafted this form in a general way, and hope that it will meet with your approval.

The clause that you wished inserted regarding the reduction of ores during the time allowed for development, I have left optional with the party of the second part. You must understand that ore must first be developed in quantity and thereafter transportation facilities must be provided for economical handling, before ore can be profitably shipped. Under the circumstances I think it best to leave the matter optional.

The clause that you suggested, providing for a deposit of \$15,000, which is to guard against the assignment of the contract, I have modified to read: "without the approval of the party of the first part, or unless a [111—78] deposit of \$15,000 be made by the party or parties to whom this option and contract may be assigned." I am of the opinion that this will be to the interest of all parties to the transaction. While the Stauffer Chemical Company have not in view the assigning of the option and agreement still conditions may change, and as long as your clients will approve of any new parties interesting themselves, it will make no difference in the transaction as a whole, or in case \$15,000 is deposited this in itself will be ample evidence of good faith.

The form as a whole, is merely in the rough; I am

not looking for professional criticism as I make no pretense of being a lawyer, but I think you will find the various points brought out sufficient to base the ultimate negotiations upon.

I received your communication of recent date stating that parties in interest are out of the city. I hope by the time this reaches you, conditions will be so that prompt considerations can be had. I will appreciate it, if the enclosed meets with your general approval, that you will wire me to that effect.

You will note that I am not asking for any commission out of the \$75,000, as agreed upon between us; I have arranged for the addition of \$10,000, as shown in the contract, above your price, as my commission in the deal, and this is satisfactory to the Stauffer Chemical Company. As the deal is being arranged between the parties direct your escrow instructions to the Bank of Shasta County, [112—79] must provide to pay me \$10,000 when the deal is concluded, or in case the deal is concluded earlier on a discount basis, the instructions should read that I am to receive ten per cent. commission of the amount involved in the transaction.

I think it will be well to accept a provision that will provide for a conclusion of the deal on a \$50,000 basis, provided this money is paid, say by the 1st of July, 1907. By referring to my correspondence you will note where I mention a proposition from them providing for a 90-day clause.

Yours very truly,

M. E. DITTMAR.

P. S.—The provision for removing machinery will encourage the use of air compressors for power drills—diamond drills, etc. [113—80]

**Defendant's Exhibit 12 [Letter, March 28, 1912,
Hatch & Clute to M. E. Dittmar].**

March 26, 1912.

March 28, 1912.

March 19th, 1907.

PHOENIX SECURITIES CO.

Mr. M. E. Dittmar,
Redding,
California.

Dear Sir:

Your letter of March 6th was received by us on Saturday last, the 16th inst., and your letter of March 13th with proposed form of option and contract came to hand to-day.

The parties referred to by Mr. Hatch in his letter of February 25th as being out of town are still absent from the city, and Mr. Hatch himself is away, not to return until the 25th inst., but will promptly thereafter give the matter his attention.

We want to call your attention to a slight inaccuracy in your letter of March 6th at the beginning of the second paragraph of said letter, where you say:

“You (H. & C) state that you are not ‘very confident,’ ” etc.

You will observe by Mr. Hatch's letter of Febru-

ruary 25th that he says that we *are* "very confident," etc.

Yours very truly,

(Sgd.) HATCH & CLUTE.

FMC/ALB. [114—81]

Defendant's Exhibit 13 [Letter, 4-12-1907, Hatch & Clute to M. E. Dittmar].

March 26, 1912.

4-12-1907.

Re Phoenix Securities Co.

M. E. Dittmar, Esq.,

Redding,

Calif.

Enclosed please find a rough draft agreement, following as closely as I could your draft but, of course enlarging on it substantially. I think I have kept within bounds of fairness where a proposed purchaser pays nothing in cash and takes eighteen months to decide whether or not he wants to buy our property.

I appreciate the Stauffer Co. may submit it to their lawyer and he will propose this and suggest that which at this long distance may cause us never to get together. At the same time, if the Stauffer Co. will not vary anything that is not absolutely necessary in their opinion and very material, I think there will be no trouble.

We are wiring you to-day in reply to your telegram that Stauffer will not give \$65,000 for the property by June 1st. One of the two principal parties with whom we consulted, is evidently desirous of nego-

tiating a deal with Stauffer if it can be negotiated, but they will surely not come down to any such figures as were intimated in some letters you wrote a month or so ago, [115—82], and we wired on the theory that perhaps rather than let the matter slip through you can secure a compromise figure somewhere between fifty and eighty-five thousand dollars, which will net us something between fifty and sixty-five thousand, which we can induce all sides to consent to. At any rate, we will try to do anything that you advise us can be carried out at your end.

Up to the present time, we think we have not had any suggestion or proposition from the Stauffer Co. only questions, as we understand you, that you have asked us, as distinguished from propositions from the Stauffer Co. to the Phoenix Co. We think perhaps that fact is a strong factor in influencing the directors of the Phoenix Co.

Excuse the roughness of the draft. You seemed to be in a hurry for it and we were anxious to accommodate you.

Believe us, dear sir,

Faithfully yours,

(Sgd.) HATCH & CLUTE. [116—83]

LMC.

Defendant's Exhibit 14 [Letter, April 20, 1907, M. E. Dittmar to Hatch & Clute].

March 26, 1912.

MINERAL WEALTH PUBLISHING CO.

M. E. DITTMAR, Editor.

(Cut)

W. D. EGILBERT, Bus. & Adv. Mgr.

Redding, Cal., April 20, 1907.

Hatch & Clute, Esqs.,
100 Broadway,
New York, N. Y.

Dear Sirs:

I received your communication enclosing form of contract between yourselves and the Stauffer Chemical Co. I am forwarding the same to the Stauffer Chemical people together with some suggestions that I believe essential to a deal being concluded and am mailing a copy of the letter to you so that you will understand the points referred to. I believe that in each case where I suggested changes or modifications that such change or modification will be to the interest of all parties concerned. You will understand that I know the conditions in this district very thoroughly and would not exact anything that is unreasonable on the one hand nor would I be willing to be party to a contract that would exact unreasonable things from myself.

The enclosed copy is self-explanatory.

Yours very truly,

M. E. DITTMAR. [117—84]

**Defendant's Exhibit 14a [Letter, April 20, 1907, to C.
de Guigne].**

March 26, 1912.

April 20, '7.

C. de Guigne,

President Stauffer Chemical Co.

Dear Sir:

I enclose herewith copy of proposed form for contract between the Phoenix Securities Co. and yourselves. This will no doubt be taken up with your legal representatives and you may have some suggestions to make or some new clauses that you wish embodied. I have made a few marginal notes, one on page 3 regarding the treating of ore. I should suggest that the wording be so modified as to include the net value of ore only, to be deposited on account of the Phoenix Securities Co. and later, on the conclusion of the purchase, to be applied on the purchase price otherwise to be retained by the parties of the first part. Of course it is optional with you whether you reduce ore or not but if you will have to pay cost of mining, cost of transportation, cost of reduction and cost of marketing it would not be business to do any mining at all until such time as you have actually concluded the purchase of the property. Under the circumstances it would be wise for both parties to the contract to agree to apply the next results of ore extraction only and the clause should be modified to that extent. [118—85]

On page 5 I make a note modifying the clause that relates to the rights of the party of the second part

allowing the 30 days discontinuance of work in case of labor troubles. This clause is worded so as to read: "which trouble shall be such as to extend to other properties in the vicinity." This part of the clause should be cut out. It is possible that labor troubles may arise and be confined to this one property only and one then should have ample time to make any changes necessary.

On page 7 the clause relating to forfeiture of tools, cars, tracks, etc., should be modified by a paragraph exempting all machinery from forfeiture. I feel confident that the Phoenix Securities Co. will agree to this as a failure to do so would merely result in no machinery being placed on the ground and hand work would necessarily be slow and would handicap exploration and development. For instance, you will no doubt want to place a diamond drill on the ground for exploration purposes, and any one understanding conditions, would not expect a forfeiture of machinery of this nature, so when it is explained I feel confident there will be no difficulty. The same thing is true of air compressors and power drills. If machinery of this nature was excepted there would be no objection to the forfeiture of the ordinary tools used in mining as a considerable supply of these tools including cars and tracks go with the property.

I received a wire from the Phoenix Securities people to the effect that they would consider a \$50,000 cash offer at the end of 90 days or rather that it would probably [119—86] receive favorable consideration. This wire was in answer to my last

letter in which I gave my views of the situation in a general way.

I am sending a copy of this letter to the Phoenix Securities people. Kindly make any suggestions you wish in relation to the contract and return to me at the earliest possible date so that I may forward them to my principals.

I wish to state also that in addition to signing up contracts between yourselves I shall expect a contract concurred in by both yourselves and the Phoenix Securities Co. to pay me the \$10,000 commission decided upon in case the property is acquired at the gross price of \$85,000 on the 18 months option—or in case it is acquired for a lesser amount in shorter time then I am to receive 10% of the purchase price. When we have arrived at an understanding regarding the terms of the contract this additional contract with myself can be entered into, and instructions given to the Bank of Shasta County in order that when the payments are concluded through this Bank a segregation can at that time be made in line with our understanding.

Yours very truly, [120—87]

Defendant's Exhibit 15 [Letter, 4-26-1907, Edw. S. Hatch to M. E. Dittmar].

March 26, 1912.

4-26-1907.

Re Phoenix Securities Co.

M. E. Dittmar, Esq.,

Redding,

Calif.

We acknowledge receipt of your favor of the 20th

with a copy of your letter to the President of the Stauffer Co. of like date, by mail this morning. We presume really it does not call for any answer from us at this time but an expression of our views may arrive in Redding in time to aid you in your negotiations. Hence, we will make the following suggestions.

We regret that you felt constrained to volunteer the suggestions contained in your letter of the 20th to the Stauffer Co. because we assumed that you represented our interests, as distinguished from theirs and that no matter what degree of fairness you use in the matter, you can expect that you will be asked, as representing us, to concede more.

In the next place, you did not entirely grasp the legal meaning of the paper which was sent to you, which you altered and criticized and passed along to the Stauffer Co.

The theory of that paper so far as the matter of the ore is concerned, was that the Securities Co. should retain title at all times in the ore up to the time that [121—88] the Stauffer Co. is ready to buy and pay for the property. The changes that you make transfer the title we fear to the Stauffer Co. to be accounted for, it is true, to the Securities Co., but in law there is a great difference between the two situations and there is a great difference in the protection to the mine owner and there is no disadvantage to the proposed purchaser where such purchaser is a person of the financial responsibility of the Stauffer Co.

Then again in the matter of labor troubles, there

are a great many of us who hardly think it is fair, where the mine operator has a personal difference with his foreman, or with perhaps only an ordinary miner that is taken up by other miners who refuse to do thus and so unless the employer will concede thus and so, and strike, to have the loss borne or even shared by the mine owner, but where the miners in a certain district refuse to work under fair conditions and fair wages, in the opinion of miners, that is a proper provision to be included in a contract.

We are not inclined to bother much over a fair change in our contract about a lien on the personal property but that clause is contained in agreements in this office and accepted by people who are in the same condition as the Stauffer Co., but as the Stauffer Co. is presumed to be so financially responsible, the clause is not so very material. On the other hand, it is material to be observed as far as reasonably possible. [122—89].

We doubt whether our clients would appreciate the statement in your letter about the segregation of the funds to pay your commissions. That is liable to be taken as a reflection on us, I imagine and I think it may be that our clients will be prepared to make a fair agreement in relation to the payment to you of your commissions as soon as they get the money, and even perhaps arrange to have it paid to the Bank of Shasta Co. for you, but I doubt if they would consent to what I certainly never would consent to and that is, to have anybody else pay my bills for me and I should not be surprised if our clients would want the transaction closed here in New York,

or what would be practically closing in New York, even if the deeds are delivered in Redding. However, those matters we presume can be further discussed with you when you have heard from the Stauffer Co., but I wish to intimate to you these suggestions which are liable to be formulated into objections.

I should judge from your letter that if the property is sold for \$50,000 you expect your commissions to be \$5,000 and I am in hopes that your letter means what was intimated in your prior letter to us when you spoke of \$85,000, namely that the difference between \$75,000 and \$85,000 was to be paid to you as commissions and I hope your idea now is that the price we will sell for is to be \$55,000 and that your \$5,000 commissions is to be paid over and above \$50,000 paid to the Securities Co. Of course, if that is the meaning of your letter, I take back all that is intimated above as to segregation. [123—90] You surely would be justified in having that \$5,000 paid direct to you.

I looked up to-day the facts in relation to our purchasing this property and at the time you sold it to us, we surely assumed it was worth at least \$75,000 and we note that the consideration expressed in the papers is \$60,000 to you; \$55,000 in one deed and \$5,000 in another. I am frank to say I do not recall just how the \$60,000 was paid and my recollection is that it was paid partly cash and partly notes and partly in bonds of the Gold Mining Co. But apparently it was on a theory of a \$60,000 valuation. Yet your recent telegrams seemed to assume that

\$65,000 was all out of the question to be realized in 90 days from the Stauffer Co.

This letter is intended as a personal, good-natured suggestion and intimation of how the wind blows around the city of New York to-day and looking forward to a further letter from you before ever you receive this, I remain, with kind regards,

Faithfully yours,
(Sgd.) EDW. S. HATCH.

LMG.

After dictating the foregoing yesterday afternoon, the 26th, we received first the telegram from the Stauffer Chemical Co., at Redding, that they would accept the contract with the modifications contained in your letter of the 20th and the contract to be dated May 1st but that we should wire acceptance to their company at San Francisco. [124—91]

Shortly after that we received your telegram that the contract was acceptable and to wire our acceptance and have the contract executed in triplicate promptly and that we should wire the Bank.

Between 6 and 6:30 we received a wire from the Bank that the Stauffer people want to take charge of the property May 1st, requesting that we give your telegrams of that date prompt attention.

We immediately communicated with the President of the Company and with the majority of the directors but of course could not obtain any definite word until this morning and then only individual expressions of opinion, and neither could we have any papers executed until we have a Board meeting, which we will endeavor to secure a quorum for to be

held next Friday, the 3rd.

In the meantime, I will ship the draft contract into the best shape I can to cover the modifications suggested in your letter of the 20th, so far as I can secure the approval of a majority of the directors, and in that respect please urge upon the Stauffer people and anybody else interested, not to be too technical in their criticism of the changes which are not exactly as you may have meant to have them.

Any differences between the meaning of your words in your letter of the 20th to the Stauffer people, and the words we have used in modifying our former contract to correspond with yours as near as we can, can surely be agreed upon, independent of the contract and by correspondence, for they are not very material between honorable and responsible [125—92] contracting parties.

We are wiring you this morning so that by your time you should receive it before noon, as follows:—"Mailing proposed modified contract for joint execution, inform Bank. Hatch & Clute."

We are wiring the Stauffer Chemical Co. San Francisco, as follows:—"Our clients will accept contract with modifications. Writing Dittmar enclosing modified conditions. Hatch & Clute."

We assume you will advise the Bank so there is no necessity of our wiring them, for we surely would find it difficult to explain by wire what is stated in this letter.

There will not be the slightest objection for the Bank to give the Stauffer people possession of the Summit & Graves property on receipt of this letter

and assuming they are satisfied to execute the contract and without waiting to receive our executed contract.

On the other hand, on receiving a wire from you or the Stauffer Co. that they have signed the enclosed contract, we will have two copies signed here and wire you or them of the execution of the papers. Then when the Stauffer people send their copy of the contract to us, if there are any details to be practically modified, they can write us and we will endeavor to comply with any reasonable request they make, and in that respect you might advise the Stauffer people that we have been counsel something like fifteen years for the people in control of the Phoenix Co. and in that length of time we believe we have never had a lawsuit except one in relation to the deLamar property [126—93] where we are suing de Lamar, and have never had any serious dispute or difference with anybody and that is about the best recommendation I guess the Stauffer Co. want to guarantee them against any serious differences, so far as our clients are concerned.

Of course I am not technical in this last statement, for it is possible some little disputes arose some years ago in Phoenix, Arizona. In fact, I think there were some little differences between some of the people down there when an old company was in straightened circumstances financially, but I speak in a broad sense, for even those little matters, whatever they were, were straightened out satisfactorily in the end.

You notice I have put in a clause providing for

the payment to you of your commissions, in addition to the \$50,000, because I thought perhaps we would need that assistance to bring around the majority of the Board of Directors, who felt that where they had purchased the property for \$60,000 and had spent all the money they have on it since and then turned around and sold it for \$50,000 or even \$55,000 it would be a little difficult to explain to their satisfaction.

If, however, the Stauffer people will not pay you \$5,000 in addition to the \$50,000 you will have to refer to that in your telegram and strike out that paragraph and we will have to strike it out here, submit it to the Board and see whether they will let it go through, but I sincerely trust you will be able to handle it without embarrassing me to that extent. On the other hand, if it is [127—94] stricken out, you surely have a letter from us that your commissions are to be 10% and this letter confirms my understanding of it, and I will have the Board authorize the payment of that commission to you from the proceeds of the sale to the Stauffer Co. and will give you a separate paper as evidence thereof.

By the way, as I have not time to write the Bank, you can explain to them that the directors of the Phoenix Co. seemed to think it is better financial policy to have the money paid to New York, rather than to Redding, for although we do not know of any lawsuits or troubles that might arise and do not know of any obligations of the Phoenix Securities Co. to anybody that would give cause for lawsuits, we should not wish to have the money tied up in Cali-

foria. We would rather conduct any lawsuits here in New York, if any are to be conducted, and I am sure the Bank has confidence that we will see that the right thing is done for them from the proceeds, if there are ever any proceeds resulting from this contract and we will endeavor to write them in respect to *these* matter at another time.

ESH. [128—95]

Defendant's Exhibit 16 [Telegram, April 26, M. E. Dittmar to Hatch & Clute].

March 26, 1912.

POSTAL TELEGRAPH COMMERCIAL CABLES.
(CUT)

CLARENCE H. MACKAY, President.

TELEGRAM.

Registered Trade Mark. Design Patent No. 36369.
The Postal Telegraph-Cable Company (Incorporated) transmits and delivers this message subject to the terms and conditions printed on the back of this blank.

Delivered from
20 Broad St.

137 sf tu 25.

Redding Calif Apl 26

Hatch and Clute 100

Broadway Newyork.

Contract acceptable with modifications suggested letter april twentieth, wire your acceptance execute contract triplicate promptly date may first. Send bank Shasta county. Wire when may receive.

M. E. DITTMAR, 330p. [129—96]

**Defendant's Exhibit 17 [Letter, May 4, 1907, M. E.
Dittmar to Hatch & Clute].**

March 26, 1912.

MINERAL WEALTH PUBLISHING CO.

M. E. DITTMAR, Editor.

W. D. EGILBERT, Bus. & Adv. Mgr.

(Cut)

Redding, Cal., May 4, 1907.

Messrs. Hatch & Clute,

100 Broadway,

New York, N. Y.

I have yours of the 26th enclosing new form for the consideration of the Stauffer Chemical Company. As a whole the form, I believe, will be satisfactory but it seems to me that there are a number of points that should be put in somewhat different form than at present. For instance, at the top of page 12 the sentence "to a smelter for testing purposes," should read "to a smelter or laboratory," as tests will no doubt be more apt to be of a character to be made in a laboratory instead of a smelter. The second paragraph on page 18 should be made to read "shall be properly timbered wherever necessary." Much of the rock through which tunnels will be driven is so hard that timbering is not necessary at all and in such cases it should not be made obligatory to put timbers in. The paragraph on page 16 referring to forfeiture of improvements may leave the question open whether such improvements as diamond drill outfits, [130—97] compressor plants or power drills would be forfeited in case of installation.

Equipment of this nature will be of great value to the property if installed to assist in rapid exploration and development but if the party of the second part was compelled to forfeit such machinery in case of relinquishing the option it is very likely that it would never be installed and only hand-work performed in the development. This will retard development and will in no wise benefit yourselves. All contracts that I have ever entered into either buying or selling mining property always carried a clause providing for the non-forfeiture of equipment of the nature mentioned but if you are of the opinion that the omission of the exception in the forfeiture clause referred to on page 16 would tend to handicap the party of the second part and the development of the property I think it will be very well to then make such a change in a supplemental contract that would overcome this clause.

Otherwise I am inclined to think that any little changes can be readily disposed of in supplemental way and no doubt the Stauffer people will be ready to enter into their part of the arrangement at once.

I note what you say regarding my commission. I thought it wise to have both the Stauffer Chemical people and yourselves enter into an agreement authorizing the commission as agreed upon. The price fixed to the Stauffer Chemical people was based on \$75,000.00 net to yourselves as discussed while I was in New York, to this price I have added \$10,000.00 as my commission based on an 18 months' contract. This of course is a little over ten per cent. [131—98] but in the sale of mining properties a much

larger commission is usual than in ordinary sales unless an outright purchase is made, in which event, the commission is usually based on the amount of money expended in the transaction. If a deal is very large the commission is frequently lower. In case the sale is concluded in the course of a few months for a lower figure than under the time arrangement covering 18 months, then I am willing to accept ten per cent or a smaller commission percentage than if I must wait for the deal to be consummated 18 months hence.

As far as the commission clause is concerned I do not know, of course, how that will strike the Stauffer Chemical Company but that clause in the matter of time and amount would be subject to modification any way. It resolves itself eventually into being willing to take the chance to buy a prospect which may never develop into a mine provided a satisfactory discount may be obtained. Knowing the property and knowing the Shasta County Copper belt thoroughly, speaking for myself I would rather take property on the development option and carry on exploration for purpose of demonstrating ore paying for the property provided ore was demonstrated, at the amount stated, rather than to pay one third of that amount down for merely prospective ground. Of course I am anxious to see the Phoenix get as much money as possible as it is to my interest. The bonds and other securities that I hold in the Phoenix Securities Company are more important than my commission in [132—99] this deal. I am anxious to see the Phoenix Securities

accomplish something and if proper direction is had especially on your Bully Bill holdings to can be made a valuable property.

As soon as I can conclude matters with the Stauffer Chemical interests I will arrange for my contract for commission between you. It seems to me that this matter should be disposed of at the same time that the contract is entered into as I have given the proposition considerable attention and visited the mine a number of times in the interests of the deal and will certainly earn anything in the way of commissions as reasonable as I am asking in this case.

Yours very truly,

(Signed) M. E. DITTMAR. [133—100]

**Defendant's Exhibit 18 [Agreement, May 1, 1907,
Phoenix Securities Company and The Stauffer
Chemical Co.].**

THIS AGREEMENT, made and entered into as of the first day of May, A. D. 1907, and as of the City of New York, in the State of New York, in the United States of America, by and between the PHOENIX SECURITIES COMPANY, a corporation organized under the laws of the State of Maine, with a place of business in the said City of New York, party of the first part, and The Stauffer Chemical Co., a corporation organized under the laws of California, with a principal place of business in the City of San Francisco, State of California.

WITNESSETH:

That the parties to this agreement for and in consideration of the sum of one dollar, lawful money

of the United States, in hand paid by each of the parties to the other, the receipt of which is hereby severally acknowledged, and the further consideration of the various concessions, undertakings and agreements by the several parties assumed, promised or agreed to with each other and as evidenced by the terms of this contract, hereby give and accept upon the terms hereinafter set forth the right and option to purchase all those certain mines or mining claims situate, lying and being in Section 20 and 30, in Township 34 North, Range 5 West, M. D. M., and being in the Backbone Mining District, County of Shasta, State of California, and generally known as the Summit & Graves [134—101] properties, belonging to the Phoenix Securities Co., and which was formerly the property of the Shasta Gold Mines Corporation, purchased from or under contract with one M. E. DITTMAR, and which premises are more particularly and generally described, by the said dimensions, which have not been accurately surveyed, more or less, as follows:

All that certain group of quartz mining claims, situate, lying and being in Backbone Mining District, in the County of Shasta, State of California, known as the NORTH MAMMOTH EXTENSION GROUP OF QUARTZ MINING CLAIMS, and embracing and including:

(1) That certain quartz mining claim or location known as the "Summit No. 2," a copy of which notice of location is of record in the office of the County Recorder of said County of Shasta, in Book 27, at page 111, Miscellaneous Records of said County of

Shasta, and a copy of an amended notice of location thereof is of record in said office in Book 29 at page 6, said Miscellaneous Records;

(2) That certain quartz mining claim or location known as the "Summit No. 3," a copy of notice of which location is of record in the office of the County Recorder of said County of Shasta, in Book 27, at page 109, Miscellaneous Records of said county and a copy of an amended notice of location thereof is of record in said office in Book 29, at page 7, said Miscellaneous Records;

(3) That certain quartz mining claim or location known as the "Summit No. 4," a copy of notice of which location is of record in the office of County Recorder of [135—102] said County of Shasta, in Book 27, at page 110, Miscellaneous Records of said county, and a copy of an amended notice of location thereof is of record in said office in Book 29, page 7, said Miscellaneous Records;

(4) That certain quartz mining claim or location known as the "MARGARETTE MINE," a copy of notice of which location is of record in the office of the County Recorder of said County of Shasta, in Book 27, at page 366, Miscellaneous Records of said County, and an amended notice of location thereof is of record in said office in Book 27 at page 453, said Miscellaneous Records;

(5) That certain quartz mining claim or location known as the "YANKEE MINE," a copy of notice of which location is of record in the office of the County Recorder of said County of Shasta, in Book

27, at page 367, Miscellaneous Records of said County;

(6) That certain quartz mining claim or location known as the "JOKER QUARTZ CLAIM," a copy of notice of which location is of record in the office of the County Recorder of said County of Shasta, in Book 29, at page 4, said Miscellaneous Records;

(7) That certain quartz mining claim or location known as the "JUMPER QUARTZ CLAIM," a copy of notice of which location is of record in the office of the County Recorder of said County of Shasta, in Book 29, at page 5, Miscellaneous Records of said County;

(8) That certain quartz mining claim or location known as the "BANNER QUARTZ CLAIM," a copy of notice of which location is of record in the office of the County Recorder of [136—103] said County of Shasta, in Book 29 at page 5, Miscellaneous Records of said County;

Said quartz mining claims are located in the south half of Section 20, Township 34 North, Range 5 West, M. D. M., and reference is hereby expressly made to the above mentioned records of the County of Shasta, for a more particular description thereof;

ALSO ALL those certain lots, pieces or parcels of land situate, lying and being in the said County of Shasta, and particularly designated and described as follows, to wit;

That certain group of quartz mining claims known as the SUMMIT CONSOLIDATED GROUP OF QUARTZ MINING CLAIMS, and embracing and including:

1. That certain quartz mining claim or location known as the "MAIN MINE," located July 28, 1899, notice of which location is of record in the office of the County Recorder of said County of Shasta, in Book 17 at page 617, Miscellaneous Records of said County;

2. That certain quartz mining claim or location known as the "YANKEE MINE," located July 24th, 1899, notice of which location is of record in the office of the County Recorder of said County of Shasta, in Book 17 at page 518, Miscellaneous Records of said County;

3. That certain quartz mining claim or location known as the "IOWA MINE," located the 28th day of July, 1899, notice of which location is of record in the office of the County Recorder of said County of Shasta, in Book 17, at page 618, Miscellaneous Records of said County;

4. That certain quartz mining claim or location [137—104] known as the "OREGON MINE," located the 28th day of July, 1899, notice of which location is of record in the office of the County Recorder of said County of Shasta, in Book 17, at page 520, Miscellaneous Records of said County;

5. That certain quartz mining claim or location known as the "TEXAS MINE," located the 24th day of July, 1899, notice of which location is of record in the office of the County Recorder of said County of Shasta, in Book 17 at page 519, Miscellaneous Records of said County;

6. That certain quartz mining claim or location known as the "KEYSTONE MINE," located the

28th day of July, 1899, notice of which location is of record in the office of the County Recorder of said County of Shasta, in Book 17 at page 521, Miscellaneous Records of said County;

7. That certain quartz mining claim or location known as the "McHUGH MINE," located the 8th day of August, 1899, notice of which location is of record in the office of the County Recorder of said County of Shasta, in Book 17, at page 615, Miscellaneous Records of said County;

8. That certain quartz mining claim or location known as the "DORSEY MINE," located the 28th day of December, 1902, notice of which location was recorded in the office of the County Recorder of said County on the 28th day of July, 1905; and

9. That certain quartz mining claim or location known as the "AMERICAN MINE," located the 28th day of December, 1902, notice of which location was recorded in the office of the County Recorder of said County of Shasta, on the 28th day of July, 1905. [138—105]

All of said claims or location lying and being in Section 30 of Township 34 North, Range 5 West, M. D. M.

ALSO that certain group of quartz mining claims or locations known as the GRAVES CONSOLIDATED GROUP OF MINES, located in Section 30, Township 34 North, Range 5 West, M. D. M., and lying South of the Summit Consolidated Group of Quartz Mining Claims, and embracing and including the following claims:

1. That certain quartz mining claim or location

known as the "YELLOW JACKET MINE," located the 7th day of February, 1899, preliminary notice of location of which is recorded in Book 15, at page 247 and completed notice of location recorded in Book 16, page 53, Miscellaneous Records of said County;

2. That certain quartz mining claim or location known as the "KENO MINE," located the 7th day of February, 1899, preliminary notice of location being of record in Book 15 at page 252, and final notice of location in Book 16, at page 136, Miscellaneous Records of said County;

3. That certain quartz mining claim or location known as the "JAY BIRD MINE," located the 8th day of February, 1905, notice of said location being of record in Book 29 at page 205, Miscellaneous Records of said County;

4. That certain quartz mining claim or location known as the "COPPER QUEEN MINE," located the 7th day of February, 1899, the preliminary notice of location being of record in Book 15, at page 250, and the completed notice of location in Book 16, at page 54, Miscellaneous Records of said County;

5. That certain quartz mining claim or location known as the "IMPERIAL MINE," located the 7th day of February, 1899, the preliminary notice of location being of record in [139—106] Book 15, at page 246, and the completed notice of location in Book 16 at page 51, Miscellaneous Records of said County.

6. That certain quartz mining claim or location

known as the "PINE CRAG MINE," originally located the 27th day of February, 1899, notice thereof being of record in Book 15 at page 417, Miscellaneous Records of said County and relocated the 15th day of April, 1899, notice thereof being of record in Book 16, at page 135, Miscellaneous Records of said County;

7. That certain quartz mining claim or location known as the "RED GOSSON MINE," located the 15th day of April, 1899, notice thereof being of record in Book 16, at page 139, Miscellaneous Records of said County;

8. That certain quartz mining claim or location known as the "WEST EUREKA MINE," located the 7th day of February, 1899, preliminary notice of location being of record in Book 15 at page 253, and completed notice of location being of record in Book 16 at page 49, Miscellaneous Records of said County;

9. That certain quartz mining claim or location known as the "JOSEPHINE MINE," located the 26th day of March, 1900, notice of location thereof being of record in Book 20, at page 40, Miscellaneous Records of said County;

10. That certain quartz mining claim or location known as the "DOROTHEA MINE," located the 8th day of February, 1905, notice of location thereof being of record in Book 29 at page 208, Miscellaneous Records of said County; and [140—107]

11. That certain quartz mining claim or location known as the "JUMBO QUARTZ CLAIM," located the 8th day of February, 1905, notice of location

thereof being of record in Book 29, at page 206, Miscellaneous Records of said County.

Reference being hereby expressly made to said records of the County of Shasta for a more particular description of said mines and mining claims.

TOGETHER with all the dips, spurs and angles and also all the metal, ores, gold and silver bearing quartz, rock and earth therein; and all the rights, privileges and franchises thereto incident, appendant or appurtenant or therewith usually had and enjoyed, and also all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining and the rents, issues and profits thereof.

IT IS UNDERSTOOD, AGREED AND COVENANTED between the parties hereto that the length of the option shall extend for eighteen months from the first of May, 1907, until the first day of November, 1908.

That the agreed price that the party of the second part shall pay and on receipt of which the party of the first part will deliver a good and sufficient deed of said property to the party of the second part, is the sum of eighty-five thousand (85,000) dollars, gold coin of the United States of America.

That the time and place for the delivery of said deed and the payment of said purchase price, if no other time and place shall be otherwise agreed upon in writing between [141—108] the parties shall be the 30th day of October, 1908, at twelve o'clock noon, at the office of the Bank of Shasta County, which bank is now located at Redding, California.

That in the meantime and subsequent to the execution and delivery of this agreement, the party of the second part shall have a license, which it is understood and agreed is not, however, a lease or an interest in the real estate itself, to enter in and upon said premises and permit its employees so to do, until such time, and until such time only, as the party of the second part shall fail for any reason to live up to the terms of this agreement to be performed on its part, or the party of the second part shall fail for any reason in the covenants and conditions herein provided for it or its agents to be performed.

That the purposes for which the party of the second part shall exercise the license of using said premises shall be only for conducting exploration and development work and to mine and extract ore therefrom under this option and agreement and which shall be done in a good and miner-like fashion.

IT IS FURTHER AGREED that the party of the second part shall have the right to reduce, smelt or otherwise dispose of, any ore produced from the herein described mines or mining claims, but said ores or their proceeds shall nevertheless remain at all times the property of the party of the first part, the net amount thereof or therefrom to be accounted for to the party of the first part by the party of the second part, and by the party of the second part to be deposited [142—109] meanwhile with the Bank of Shasta County; and with such deposit shall be filed a true and correct statement of said reduction or disposition of ores and in addition thereto,

or as a monthly summary thereof, a statement shall be filed by the party of the second part with the Bank of Shasta County, on or before the last day of each and every month commencing with the month of June, 1907, and if no ore shall have been reduced, that a statement to that effect shall be filed as of such date and each and every month thereafter.

The statement, if any ores are reduced or otherwise disposed of, shall show the amount thereof in gross; the cost of mining, transporting and reducing said ores and the cost of marketing the metals recovered. That during the period between the execution of this agreement and the time that the party of the second part shall fail to live up to the terms of this agreement, so far as the same shall be assumed by it, or until such a time as the party of the second part shall receive a deed as aforesaid from the party of the first part, all moneys and ores or the net proceeds of ores so received shall be the property of the party of the first part, but upon the delivery of a deed by the party of the first part, in accordance with the terms of this agreement, then said money and ores shall be paid over and delivered to the party of the second part, and applied on the purchase price for these properties, but not until that time shall the party of the second part have legal title thereto, and if the party of the second part elects to forfeit under this option, or shall fail to carry out and perform the conditions thereof, then all such money and ores shall be paid and delivered [143—110] at once by the Bank of Shasta County

to the party of the first part, or its successors or assigns.

That as a modification to the last preceding paragraph, it is understood and agreed that the party of the second part shall have the right to remove a necessary amount of ore, and only a necessary amount, from the property of the party of the first part, to a smelter for testing purposes, and such ore, which is assumed to be of a small and insignificant amount in intrinsic value, shall be without a condition that the proceeds thereof are to be deposited with said bank.

That the said party of the second part will give to the party of the first part, or its legal representative or representatives a reasonable opportunity to verify the correctness of any statements filed with said Bank or provided for under the terms of this agreement and to that extent, or a necessary extent, to verify the correctness of said statements, the party of the first part may examine the books of the party of the second part.

That the party of the second part agrees that at all times during the continuance of this option, it will not cause or permit any interference to occur on the property herein described or referred to, to hinder or prevent a representative of the party of the first part at any and all times having access to all parts of the mine or mines or mining claims, and will furnish ample opportunity to the party of the first part to take samples of any and all ores exposed therein and the workings thereof, including drill cores, provided

a diamond or core drill is used in exploratory work.
[144—111].

IT IS FURTHER UNDERSTOOD AND AGREED by the parties hereto that the party of the second part beginning at a time fixed as of the 15th day of May 1907 and thereafter during the term of this option, will keep not fewer than eight able-bodied mining men employed on exploration and development work on or about the premises described herein and at work thereon, unless by reason of labor troubles, for which the party of the second part is not responsible, or other absolutely unavoidable circumstances, meaning thereby circumstances that no one could reasonably avoid or prevent; and in such event of said labor troubles or such unavoidable circumstances, it is hereby agreed that there may be a thirty days' suspension of this clause in the agreement without causing a forfeiture of the terms and conditions thereof. But if with these exceptions, and limited to said thirty days, less than eight able-bodied mining men shall be kept continuously employed as aforesaid, then all rights of the parties of the second part under the terms of this agreement and all rights under this option shall cease, and it is understood, agreed and stipulated that time is to be taken as a material element and consideration in the observance and construction of the provisions in this agreement contained.

The party of the second part further agrees to keep up, do and perform, or cause to be kept up, done and performed, at its own cost and expense, all annual assessment work, by law required to be done and per-

formed upon the said mining claims herein mentioned, and to commence the same and furnish proper certificates thereof and therefor to the Bank of Shasta County for account of the party of the first part, [145—112] and to have proofs of labor so done, verified and filed in the office of the County Recorder of Shasta County, California, on or before the 30th day of October in each year during the life of this option, which said proofs shall be made for the party of the first part, and as made by its request.

That should said party of the second part on or before said 30 day of October 1907, and the 30th day of June 1908, fail to have secured said proof of labor for said respective years, and to have had the same verified and properly filed as aforesaid, then the said party of the first part shall have the right to cause the same to be done as the agent and for the account of the party of the second part and the expense thereof shall become a charge against the said party of the second part, to be paid or repaid by the said party of the second part on demand to the parties so performing the labor, or who shall furnish the money or credit therefor.

IT IS UNDERSTOOD AND AGREED that the party of the second part shall not have authority, permission, right or title to suffer or to permit any charge, lien or claim to be laid, imposed or filed against the property herein mentioned, and the party of the second part does covenant and agree with the party of the first part that no charge, lien or claim

shall be laid, imposed or filed against the property herein mentioned, or any portion thereof for any work done, performed or improvements constructed, made or attempted, or materials or supplies purchased, sold, delivered or furnished or otherwise placed on said premises by or at the request of the party of the second part or anybody acting in its name for [146—113] its interests, or attempting to act in pursuance of any authority granted under the terms of this agreement.

IT IS FURTHER UNDERSTOOD AND AGREED between the parties hereto that if at any time during the life and continuance of this option, the said party of the second part shall elect to apply for and secure a United States Patent for mining claims or any of them herein mentioned, then said party of the second part may apply for and secure said patent at its own charge, cost and expense, but in the name of the party of the first part, and the party of the second part covenants and agrees that it will pay all government, land office and other fees in connection with any application for a United States Patent that may be made during the life of this option by it or on its behalf, and said party of the first part agrees to sign, execute and verify, or cause to be signed, executed and verified for the said party of the second part, so far as it lies within its power, all such papers as may in such patent proceedings be necessary, and to instruct its representatives at the cost and expense of the party of the second part, however, to appear and give evidence in

respect thereto if necessary.

That so long as the party of the second part shall faithfully perform in every particular the covenants and agreements herein contained and referred to, the party of the first part will not interfere with the use of said premises as provided for in this agreement, but, in the event that the party of the second part shall fail for thirty days to perform any of the covenants herein provided for to be by it performed, then all rights and privileges of the [147—114] said party of the second part under this option shall be forfeited, cease and terminate at the election of the party of *the party* of the first part, and with the distinct understanding and agreement that a failure to enforce any such right or the waiver of any right or forfeiture, shall not be deemed or accepted as a precedent or a waiver of the party of the first part thereafter to avail itself strictly of its rights under the terms and conditions hereof.

IT IS AGREED AND UNDERSTOOD that as liquidated damages, the party of the second part agrees with the party of the first part, that in case of default, forfeiture or failure to live up to the terms and agreements herein provided for on behalf of the party of the second part, all payments made by the party of the second part theretofore and all cars, tracks, blacksmith outfits, improvements and buildings of every kind placed on said premises by the party of the second part shall be forfeited to the party of the first part and shall become its absolute property, and the party of the first part shall at once be entitled to the possession thereof and all right, title

and interest of the party of the second part therein shall cease and terminate.

IT IS FURTHER UNDERSTOOD AND AGREED that this agreement is intended to be strictly a personal agreement between the parties themselves with each other and not intended that the confidence vested by one in the other may be assigned or substituted, provided only that it is agreed that the party of the second part may assign this option and agreement upon the payment of Fifteen Thousand Dollars in cash to the party of the first part, by depositing the same with the Bank of Shasta [148—115] County at Redding, California, to be paid to the party of the first part, but that such payment is to be considered only a payment for the option and the right of assignment thereof, and not otherwise. In the event of any such assignment, this agreement shall have the same binding effect upon any assignee who shall assume all obligations hereof, without however releasing the party of the second part from its obligations therefor, and all of its obligations hereunder.

The party of the second part as a matter of detail in connection with the performance of the terms of this agreement does further promise that it will give immediate notice in writing, of any strike or unavoidable accident, and facts sufficient to be verified by the party of the first part as to the fairness of the conclusion that the party of the second part is prevented under the terms of this agreement from carrying out its terms, covenants and provisions, and that such

notice shall be delivered to said Bank of Shasta County.

The party of the second part will see that all shaft and permanent openings which it shall make, shall be properly timbered and that the openings shall be kept clear of all debris, material and rubbish.

That party of the second part will make itself responsible to store all valuable ore mined, which is of too low a grade or quality to justify working or shipping the same under the facilities then available, and will not permit any unnecessary or avoidable waste thereof.

IT IS UNDERSTOOD AND AGREED that this contract is not a lease and bond on this property, but only a license and option in relation to the purchase thereof. [149—116]

The party of the second part hereby assumes any and all responsibility in case of any accident to any of the employees, officers, strangers, or persons who shall be upon the premises referred to herein, and promises and agrees to hold and save the party of the first part harmless from all damage or expense in relation thereto.

The party of the second part shall have the further right or privilege to discount the purchase price provided for in this option by the payment of fifty thousand (50,000) dollars in cash, together with the payment of the commissions due M. E. Dittmar of five thousand (5,000) dollars and provided this privilege or discount is exercised by the party of the second part in the manner following, that is to say: That the party of the second part shall, not later than the 15th

day of July 1907, notify Hatch & Clute, attorneys for the party of the first party by wire of its intention thereof, and confirm said wire by depositing in the United States Mail not later than the 15th day of July 1907, a written notification addressed to the Phoenix Securities Company, care of Hatch & Clute, 100 Broadway, New York City, and in said letter of confirmation state where and when in the City of New York, before the first day of August 1907, a good and sufficient deed of said property may be delivered and fifty thousand (50,000) dollars in cash paid to the party of the first part therefor; and at the same time pay to the Bank of Shasta County, at Redding, California, the commissions due the said M. E. Dittmar, unless the same shall have been satisfactorily arranged in writing with the said M. E. Dittmar.

[150—117]

Or at the election of the party of the second part, as evidenced by said written confirmation and notice to the party of the first part, provide for the deposit of the fifty thousand (50,000) dollars in the city of New York, payable to the party of the first part in addition to the commissions to be paid the said M. E. Dittmar, and upon delivery to the party of the second part of said deed at the Bank of Shasta County, in Redding, California, but in which latter event the party of the second part shall enclose with said notice a proposed form of deed which will be satisfactory to the party of the second part, for submission to the party of the first part any time to have a proper deed executed and sent to California before the date fixed for closing the title to said property.

The party of the second part agrees that upon failure to comply with the terms of this agreement, or to avail itself of the option herein contained, the party of the second part will execute any and all papers necessary to demonstrate the absolute title to the property in the party of the first part, and of its claim against the world to interfere therewith, so far as anything has been done or suffered to be done under the terms of this agreement by the party of the second part, and will re-deliver or cause to be delivered to the party of the first part the mines or mining claims and the development work done thereon, and any ore extracted therefrom, and the net proceeds from any ore sold or disposed of, or on failure so to make good delivery of said property that the party of the first part may, as the agent of the [151—118] party of the second part cause the same to be done as though the party of the second part had lived up to the terms and provisions of this agreement in that respect, which it is understood is intended to provide that such premises and property shall be re-delivered in good order and condition, and that all shafts, drifts, tunnels, raises, winzes and other permanent workings shall be thoroughly clear of all loose rock, rubbish and ready for immediate and continuous workings without demand or a further notice.

That all notices and statements to the party of the first part provided for herein, and which are not especially provided for as to the time and place of delivery, or in the event that it shall be deemed impracticable to fairly deliver a notice intended for the party of the first part so as to make the same prac-

tically effectual, may be delivered to Edward Sargent Hatch, as counsel for the party of the first part, at his office in the City of New York, New York, which now is at #100 Broadway, in said City.

And all notices to be delivered to the party of the second part may be addressed to it under the name as stated in this agreement, and posted in the United States Post Office, at said City of New York, or at Redding, California, or may be delivered in person to an officer of the party of the second part, if the same can be personally delivered. [152—119].

IN WITNESS WHEREOF, the parties to this agreement have executed the same in their corporation names by a proper officer authorized to execute the same, and has affixed or caused to be affixed the seal of the corporation, pursuant to authority under their several By-Laws and the Laws of the States under which they were severally organized, and as of the time and place above mentioned.

STAUFFER CHEMICAL CO.

CHR. DE GINGNE, President. (Seal)

JOHN STAUFFER, Secretary.

[153—120]

Defendant's Exhibit 19 [Letter, 12-27-'07, Hatch & Clute to Stauffer Chemical Co.].

March 27, 1912.

12-27-07.

Re Phoenix Securities Co.

Stauffer Chemical Co.,

San Francisco,

California.

This letter is dictated by our Mr. Hatch in the

presence of Mr. Reiff, the President of the Phoenix Securities Company, and your Mr. Adolph Kunze, and is intended to be a general confirmation of the agreement made between the Phoenix and the Stauffer companies for the purchase and sale of the Summit & Graves property, referred to in the existing contract between those companies.

It is distinctly understood that the phraseology of this letter is not intended to be technical or necessarily followed literally, but rather the intent of the agreement to be stated in general phraseology.

The existing contract is to be annulled and no claim made in favor of either party under it.

A corporation shall be organized promptly by us under the laws of such State as will, in our opinion be most useful for your company in connection with the purposes for which the company is organized and such company shall be organized so that stock it shall issue in payment for the property in question shall be full [154—121] paid, non-assessible and without any liability whatsoever to the holder thereof and we are expected to certify to that condition when we turn over to you the stock of the company.

As to who shall pay the whole, or a portion of the expense of the organization of this company, which will really be for your benefit, or when the payment shall be made, are questions to be taken up in all fairness and equity between us.

This corporation shall own the property in question absolutely and the management of it shall be entirely with your company, and the interest of the Phoenix Company in the matter shall be only that of

a creditor of this dummy company.

The dummy company will make the agreement, in fact and in law, that has been practically agreed upon between us, as evidenced by Mr. Kunze's telegram to you of December 21st, and your answer to him of December 26th, with the slight modifications in form hereafter referred to in this letter.

This dummy company will pay for the property in question by the issuance of its entire capital stock, outside of those shares that must be issued for cash, to comply with the laws of the State where it is incorporated. The amount of the capital stock of the company can be any reasonable amount that you will designate, but of course it must not be very much in excess of the real consideration, so far as you make us responsible for the stock being fully paid. [155—122]

Furthermore, you understand that in many States the larger you make your capital the more it costs and it would not be right for you to make the Phoenix Company pay for capital stock which would be entirely for your interest and not of any possible benefit to them. It is really those questions to which I have particular reference above, where I state I think perhaps the expense of the company should be borne by you, but I am sure we will agree on that proposition hereafter without any possible doubt.

Of course, no matter what you capitalize for, in the first instance, you can increase the capital to any amount you please and we can handle that for you with very little expense and on very short notice.

This dummy company will in payment for this

property and in addition to its stock, pay \$37,500 in its bonds and in addition will make an agreement to pay a royalty of fifty cents a ton on the product of the mine, which is to be defined in such manner as will be agreeable all around; that is whether it will be fifty cents per ton mined or shipped, or whatever legal phraseology shall be considered as fairly representing fifty cents a ton on the products of the mine.

The \$37,500 in bonds of this dummy company are to be payable in addition to \$2,500 in cash which the Stauffer Company pays at this time to bind the proposition, as follows: [156—123]

\$2,500 in sixty days,
\$2,500 in four months,
\$2,500 in six months,
\$5,000 in one year,
\$10,000 in two years, and
\$15,000 in three years.

Of the \$40,000 which the Phoenix Company is to receive in cash or bonds, in addition to the fifty cents royalty agreement, the Stauffer Company pays the \$2,500 in cash and issues its obligation in some form to be agreed upon, in substance guaranteeing the payment to the Phoenix Company of an amount, all told, of \$25,000 plus the fifty cents royalty agreement.

The Stauffer Company shall not be liable legally, equitably or indirectly for the payment of the \$15,000 of bonds provided for in three years.

The bonds falling due after six months or in excess of the \$10,000 so-called cash payment, which is to be made within six months, shall draw interest

at such per cent. as the Phoenix Company may decide will most benefit them, but with the understanding that any interest that is paid on these bonds is to diminish the final payment the Stauffer Company is liable to make, which, including interest, limited to \$25,000 so far as they are concerned, as distinguished from the nominal liability of the dummy company itself.

The theory of this agreement between the dummy company and the Phoenix Company, as distinguished from the legal phraseology of it, is that if the property in question [157—124] is what the buyer and seller believe it to be, the buyer is perfectly satisfied that the seller shall have his \$85,000 out of the property, but is unwilling to involve itself (that is, the Stauffer Company) in any liability beyond the \$25,000 in addition to what they have seen fit to invest in the matter already, and if they want to abandon the proposition after they have paid this \$25,000, they want to feel at liberty to throw up the entire undertaking without any criticism or question as to their liability in the matter, and then the Phoenix people can secure what they think is in the ground, if they see fit to try to collect their bonds out of the dummy company.

I also understand that this undertaking may involve you in an investment at the end of three years, which would be so substantial that you would feel like asking an extension of time on the payment of the bonds that are due by the dummy company in three years, and although we do not pretend to make a legal agreement to nullify another agreement, we

do state that it is understood such an application shall be considered by our people with favor, as it would contemplate your spending more money on the property which would give our people a greater chance of realizing on their royalty agreement.

It is likewise understood by the Phoenix people that you are not called upon to work this property in any definite way, time or manner and that they shall rely on your reputation and their experience with you as to fair dealing and your financial ability and business methods, that when in your judgment it is to your interests and the interest of the [158—125] property to progress the work it will be progressed, and in the meantime the Phoenix Company shall have no right to interfere with your judgment in that respect.

We understand that so far as you place any portable machinery on the property of the company, or have placed any there, that it shall remain the property of the Stauffer Company, so far as the Phoenix people are concerned. But as to any other investment that you make in working this property, as for instance for labor and supplies or for timbering, such investment should not operate as an obligation of the company that could have preference over the bonds of the company that are given to the Phoenix Company and where you are not liable thereon.

The form of the protection in favor of the Phoenix Company, as against the Stauffer Company, in respect to this matter, will be agreed upon between us hereafter.

It will not be practicable for us to submit the papers that we prepare to carry out this agreement, but we will agree that the papers shall comply with our mutual understanding and if your lawyer, when we submit everything to him, can find any material variation, we will keep the meetings of this so-called dummy company open so that the phraseology can be corrected to comply with his desires and wishes and yours. [159—126]

Of course, so far as your own individual liability is concerned, naturally that will not occur except as to the first \$2,500 until the papers are submitted to you to sign, so of course you will have full opportunity to approve of them before you sign them, but as your lawyer will understand, the details of the organization and the By-Laws and those sort of things are matters that are not susceptible to submission at a distance of two or three thousand miles, but our experience in such matters is so extended you can be certain we will carry out everything you and your legal advisers require.

If this letter is in substance your understanding, wire us immediately and we will start the matter going. If it is not clearly in accordance with your understanding then you can await Mr. Kunze's arrival, which perhaps will be in a day or two later. You can wire us the \$2,500 as soon as you are satisfied with our mutual understanding of the matter.

We remain, gentlemen,

Faithfully yours,

(Sgd.) HATCH & CLUTE.

The foregoing was all of the evidence in the case. [160—127]

The cause was thereupon after argument submitted to the Court for decision and judgment and thereafter and on August 26th, 1914, the Court ordered judgment to be entered in favor of plaintiff and against defendant for the sum of five thousand dollars (\$5,000) and costs of suit and judgment accordingly was entered upon said day.

And now comes defendant and excepting to said order and judgment proposes this, its bill of exceptions thereto, and prays that the same may be settled and allowed.

Dated this 29th day of October, A. D. 1914.

L. A. REDMAN,
Attorney for Defendant.

[Stipulation Re Settling of Bill of Exceptions.]

It is hereby stipulated and agreed that the foregoing bill of exceptions is correct and that the same may be settled, approved and allowed as engrossed.

MORRISON, DUNNE & BROBECK,
MORRISON & BROBECK,

Attorneys for Plaintiff.
L. A. REDMAN,
Attorney for Defendant.

[Order Settling, etc., Bill of Exceptions.]

The settlement of the foregoing bill of exceptions having been regularly continued to the present term of court and said bill of exceptions being now presented in due time and found to be correct, the same is hereby settled, approved and allowed.

Dated November 17th, A. D. 1914.

WM. C. VAN FLEET,
U. S. District Judge.

[Endorsed]: Filed Nov. 17, 1914. Walter B. Mal-
ing, Clerk. [161]

*In the District Court of the United States, in and for
the Northern District of California.*

M. E. DITTMAR,

Plaintiff,

vs.

PHOENIX SECURITIES COMPANY (a Cor-
poration),

Defendant.

Petition for Writ of Error.

The Phoenix Securities Company, a corporation, defendant above named, feeling itself aggrieved by the judgment rendered herein in favor of the said plaintiff on August 26th, A. D. 1914, whereby it was adjudged that plaintiff have and recover from the defendant the sum of five thousand dollars (\$5,000) and costs of suit taxed at the sum of fifty-eight dollars and twenty cents (\$58.20), comes now by L. A. Redman, its attorney, and petitions said Court for an order allowing it, said defendant, to prosecute a writ of error to the United States Circuit Court of Appeals, in and for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided; also that an order be made fixing the amount of a bond for costs which the

said defendant shall give and furnish upon said writ of error.

And your petitioner will ever pray, etc.

PHOENIX SECURITIES COMPANY,

By L. A. REDMAN,

Its Attorney.

[Endorsed]: Filed Oct. 24, 1914. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [162]

*In the District Court of the United States, in and for
the Northern District of California.*

M. E. DITTMAR,

Plaintiff,

vs.

PHOENIX SECURITIES COMPANY (a Cor-
poration),

Defendant.

Assignment of Errors.

Now comes Phoenix Securities Company, a corporation, the defendant in the above-entitled action, by L. A. Redman, Esq., its attorney, and specifies the following as errors upon which it will urge its writ of error in the above-entitled action, namely:

1. That the said Court erred in rendering judgment in favor of plaintiff for the sum of five thousand dollars (\$5,000), or any other sum; and erred in not rendering judgment in favor of defendant.

2. That the evidence is insufficient to justify the implied finding of the Court that defendant authorized plaintiff to find a purchaser for the property

referred to in the fourth amended complaint; and is insufficient to justify the implied finding that defendant agreed to pay to plaintiff for his services in furnishing such purchaser any amount in excess of the sum of seventy-five thousand dollars (\$75,000) paid by such purchaser for said property and is insufficient to justify the implied finding that plaintiff did at any time discover a prospective purchaser of such property who was willing to or did agree to purchase said property for the sum of eighty-five thousand dollars (\$85,000) or any other sum upon any terms whatever.

3. That the evidence is insufficient to justify the [163] implied finding that on or about February 1, 1908, or at any time said defendant and the Stauffer Chemical Company referred to in said complaint did arrange terms of payment of the sum of eighty-five thousand dollars (\$85,000) for the property referred to in said complaint satisfactorily to defendant and said Stauffer Chemical Company.

4. That the evidence is insufficient to justify the implied finding that pursuant to said alleged sale and purchase or either thereof the defendant did sell and convey or sell or convey to said Stauffer Chemical Company said property or any part thereof.

5. That the evidence is insufficient to justify the implied finding that said Stauffer Chemical Company has fully or at all complied with all or any of the alleged terms and conditions or either thereof of said alleged sale.

6. That the evidence is insufficient to justify the implied finding that upon the completion and con-

summation or completion or consummation of said alleged sale there became due and payable or due or payable to plaintiff the sum of ten thousand dollars (\$10,000) or any other sum.

7. That the evidence is insufficient to justify the implied finding that defendant authorized plaintiff to find a purchaser of the property referred to in the complaint who would be ready, willing and able or either thereof to purchase the said property therein referred to upon such terms and conditions as might be agreed upon between defendant and such prospective purchaser.

8. That the evidence is insufficient to justify the implied finding that on or about February 1, 1908, or at any time defendant did sell and convey or either thereof to the said Stauffer Chemical Company the property referred to in the complaint for the sum of eighty-five thousand dollars (\$85,000) [164] or any other sum.

9. That the evidence is insufficient to justify the implied finding that the said Stauffer Chemical Company has paid said sum of eighty-five thousand dollars (\$85,000) to the defendant or will pay said sum to defendant for said property or will in any event or under any circumstances pay in excess of the sum of sixty-six thousand dollars (\$66,000) for said property.

10. That the evidence is insufficient to justify the implied finding that plaintiff did expend much or any time, skill or money or either thereof in and about or in or about the work and services or either thereof rendered to defendant in the securing of said Stauffer

fer Chemical Company as a purchaser for the afore-said property.

11. That the evidence is insufficient to justify the implied finding that said Stauffer Chemical Company was secured as a purchaser for said property solely or at all through the labor, services, skill and expenditures or either thereof of plaintiff.

12. That the evidence is insufficient to justify the implied finding that the reasonable or any value of the said alleged work, services, skill and expenditures or either thereof of the plaintiff is the sum of ten thousand (\$10,000) or any other sum.

13. That the evidence is insufficient to justify the implied finding that the plaintiff has duly or at all performed all or any of the conditions and terms or either thereof required on his part to be performed in and by or in or by the alleged terms of said alleged authorization and agreement or either thereof.

14. That the evidence is insufficient to justify the implied finding that defendant agreed to pay to the plaintiff [165] ten per cent of such sum of money as the defendant might receive in cash and money or either thereof on account of the sale to such prospective purchaser of the said property.

15. That the evidence is insufficient to justify the implied finding that on May 1, 1907, or at any time plaintiff did discover a prospective purchaser for said property and did introduce and bring or introduce or bring to defendant such prospective purchaser or either thereof.

16. The evidence is insufficient to justify the im-

plied finding that said alleged prospective purchaser was willing, able and ready or either thereof to purchase said property for the sum of eighty-five thousand dollars (\$85,000) or any other sum.

17. That the evidence is insufficient to justify the implied finding that said alleged purchaser did agree to purchase said property and to pay therefor the sum of eighty-five thousand dollars (\$85,000) or any other sum or either thereof.

18. That the evidence is insufficient to justify the implied finding that defendant has received from said Stauffer Chemical Company the sum of forty thousand dollars (\$40,000) in cash and money or either thereof paid prior to the date of filing said complaint.

19. That the evidence is insufficient to justify the implied finding that the alleged balance of forty-five thousand dollars (\$45,000) is due and payable or either thereof out of the smelter returns which are to arise from the working and operation of said property or either thereof.

20. That the evidence is insufficient to justify the implied finding that said alleged balance will be paid in future according to the terms and conditions or either thereof [166] of a certain instrument dated February 5, 1908, between defendant and the Summit Copper Company or at all.

21. That the evidence is insufficient to justify the implied finding that said Summit Copper Company did undertake to pay said alleged balance of forty-five thousand dollars (\$45,000) on account of said al-

leged purchase price in the manner stated in said complaint or at all.

22. That the evidence is insufficient to justify the implied finding that ten thousand dollars (\$10,000) on account of said forty-five thousand dollars (\$45,000) has been paid, leaving a balance of thirty-five thousand dollars (\$35,000) more or less or any other sum.

23. That the evidence is insufficient to justify the implied finding that defendant has received the sum of fifty thousand dollars (\$50,000) more or less on account of the purchase price of said property.

24. That the evidence is insufficient to justify the implied finding that the said Stauffer Chemical Company and the said Summit Copper Company have fully or at all complied with all the terms and conditions of said sale or that either of said companies has complied with any of the alleged terms and conditions or either thereof of said sale.

25. That the evidence is insufficient to justify the implied finding that upon the completion and consummation or either thereof of said sale, and, or, of the alleged subsequent payment of said sum of fifty thousand dollars (\$50,000) more or less there became due and payable or due or payable to the plaintiff the sum of five thousand dollars (\$5,000) or any other sum.

26. That the evidence is insufficient to justify the implied finding that said sum of five thousand dollars (\$5,000) [167] or any part thereof is or was due, owing and unpaid by defendant to plaintiff, or due or owing or unpaid by defendant to plaintiff.

27. That the evidence is insufficient to justify the implied finding that plaintiff has duly or at all performed all or any of the conditions and terms or either thereof required on his part to be performed in and by or in or by the alleged terms of said alleged authorization and agreement or either thereof.

28. The Court erred in overruling defendant's objection to the following question propounded to the plaintiff:

"Assuming the fact you stated with regard to the nature of these properties and their accessibility and the nature of the agreement which you originally had with the Phoenix Securities Company and the sale that was finally consummated, what in your opinion would be the reasonable value of your services in bringing about the final consummation of the deal?"

29. The Court erred in overruling defendant's objection to the following question propounded to the witness Lane:

"I will ask you, Mr. Lane, what, in your opinion, would be the reasonable value of the services of a mining broker in effecting the sale of about 20 or 25 full-sized mining claims in the northern part of this State, and more particularly in Shasta County, the ore in the properties being principally copper, and the properties not being on the railroad, but about seven miles off, and connected with the railroad partly by wagon road and partly by trail; the properties being sold by the broker, or rather, a contract being entered into originally by the broker, for a purchase price of \$85,000 on an eighteen months' contract, with an option that they might be taken in

three months' time, for \$50,000 cash, which agreement was subsequently modified by another agreement by which agreement the sellers secured \$2,500 cash at the time that the substituted [168] agreement was entered into, and \$33,500 in bonds and \$15,000 in cash, making a total of \$51,000 with \$15,000 remaining unpaid at the time that the broker made a claim for the reasonable value of his services?"

30. The Court erred in overruling defendant's objection to the following question propounded to the witness Lane:

"And also, Mr. Lane, disregarding the particulars of the agreement, that I embodied in the previous question, and bearing in mind simply the nature of the properties that I described, namely, that there were a number of full-sized mining claims, bearing copper ore principally, in the northern part of the State and situated, as I have stated before, what, in your opinion, would be the reasonable value of the services of a broker in securing the sale of those properties, what percentage?"

WHEREFORE, said defendant prays that the judgment in said action in favor of the plaintiff therein be reversed and a new trial of said action be ordered.

L. A. REDMAN,
Attorney for Defendant.

[Endorsed]: Filed Oct. 24, 1914. W. B. Maling,
Clerk. J. A. Schaertzer, Deputy Clerk. [169]

*In the District Court of the United States, in and for
the Northern District of California.*

M. E. DITTMAR,

Plaintiff,

vs.

PHOENIX SECURITIES COMPANY (a Corporation),

Defendant.

**Order Allowing Writ of Error [and Fixing Amount
of Bond].**

Upon motion of L. A. Redman, attorney for the defendant in the above-entitled action and upon the filing of the petition for writ of error and assignment of errors,

IT IS ORDERED that a writ of error as prayed for in said petition be allowed and that the amount of the bond for costs to be given by defendant upon said writ of error be and the same is hereby fixed at the sum of five hundred dollars (\$500).

Dated October 24, 1914.

M. T. DOOLING,
U. S. District Judge.

[Endorsed]: Filed Oct. 24, 1914. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [170]

*In the District Court of the United States, in and for
the Northern District of California.*

No. 14,982.

M. E. DITTMAR,

Plaintiff,

vs.

PHOENIX SECURITIES COMPANY (a Cor-
poration),

Defendant.

Bond.

KNOW ALL MEN BY THESE PRESENTS,
That we, PHOENIX SECURITIES COMPANY,
as principal, and the FIDELITY AND DEPOSIT
COMPANY OF MARYLAND, a corporation of the
State of Maryland, duly authorized to transact the
business of indemnity and suretyship in the State of
California, and having an office and principal place
of business for the State of New York at No. 2
Rector Street, in the Borough of Manhattan, in the
City of New York, as Surety, are held and firmly
bound unto M. E. DITTMAR in the sum of FIVE
HUNDRED DOLLARS (\$500), lawful money of
the United States, to be paid to the said M. E. DITT-
MAR, his heirs, executors, administrators and as-
signs; to which payment, well and truly to be made,
we bind ourselves and each of us, our respective
successors and assigns, jointly and severally, firmly
by these presents.

SEALED with our seals. Dated this second day
of October nineteen hundred and fourteen.

WHEREAS, the above-named PHOENIX SECURITIES COMPANY has prosecuted a writ of Error to the United States Circuit Court of Appeals, Ninth Circuit, to reverse the judgment herein of the United States District Court for the Northern District of California rendered against defendant and in favor of plaintiff.

NOW, THEREFORE, the condition of this obligation is such, that if the above-named PHOENIX SECURITIES COMPANY shall prosecute [171] its said writ of error to effect, and answer all costs if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

[Seal Phoenix Securities Co.]

PHOENIX SECURITIES COMPANY,
By H. CUMISKEY,
Sec. and Treas.

[Seal Fidelity & Deposit Co. of Maryland.]

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND.

By HUGH M. ALLWOOD,
Attorney in Fact.

Attest: JAMES R. KINGSLEY,
Attorney in Fact.

State of New York,
County of New York,—ss.

On the 5th day of October, in the year 1914, before me personally came H. Cumiskey, to me known, who being by me duly sworn did depose and say that he resides in Brooklyn, N. Y.; that he is the Secretary and Treasurer of the Phoenix Securities Company,

the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

[Seal]

WALTER F. WELCH,

Notary Public, Queens County.

Certificate filed in New York County, No. 5 New York County Register's No. 5047. Commission Expires March 30, 1915. [172]

State of New York,
County of New York,—ss.

On the 2d day of October, in the year 1914, before me personally came Hugh M. Allwood, to me known, who, being by me duly sworn, did depose and say, that he resides in the City of New York; that he is the Attorney in Fact of the Fidelity and Deposit Company of Maryland, the corporation described in, and which executed the within instrument; that he knows the seal of the said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order; and that the Fidelity and Deposit Company of Maryland has been duly authorized to transact business in the State of New York, in pursuance of the statutes in such case made and provided; and that the liabilities of said Company do not exceed its assets as ascertained in the manner provided in Section 183, of the Insurance Law, con-

stituting Chapter 33, of the Consolidated Laws of the State of New York. And the said Hugh M. Allwood further said that he is acquainted with James R. Kingsley and knew him to be the Attorney in Fact of said Company; that the signature of the said James R. Kingsley subscribed to the within instrument, was in the genuine handwriting of the said James R. Kingsley and was subscribed thereto by like order of the Board of Directors, and in the presence of him, the said Hugh M. Allwood.

[Seal]

F. A. MASSEY,

Notary Public, New York County, No. 2395.

At a regular meeting of the Board of Directors of the FIDELITY AND DEPOSIT COMPANY OF MARYLAND, held in its office in the City of Baltimore, State of Maryland, on the 4th day of October, 1911, the following resolution was unanimously adopted: [173]

“RESOLVED, That Henry B. Platt, Vice-President, James R. Kingsley, Attorney, Frank H. Platt, Edward T. Platt, Joseph A. Flynn, Hugh M. Allwood, Charles V. R. Marsh, Ernest L. Hicks and Frank A. Eickhoff, all of the City of New York, State of New York, be and each of them is, hereby appointed Attorney in Fact of this Company and empowered to execute and deliver and attach the seal of the Company to any and all bonds or undertakings for or on behalf of this Company, in its business of guaranteeing the fidelity of persons holding places of public or private trust and the performance of contracts other than insurance policies, and executing or guaranteeing bonds or undertakings required

or permitted in all actions or proceedings, or by law required, permitted or allowed.

“Such bonds or undertakings to be executed for the Company by any one of the said Henry B. Platt, James R. Kingsley, Frank H. Platt, Edward T. Platt, Joseph A. Flynn, Hugh M. Allwood, Charles V. R. Marsh, Ernest L. Hicks or Frank A. Eickhoff, and to be attested in every instance by one other of the said Attorneys in Fact, as occasion may require.”

County of New York,—ss.

I, James R. Kingsley, Attorney in Fact of the Fidelity and Deposit Company of Maryland, have compared the foregoing Resolution with the original thereof, as recorded in the Minute-book of said Company, and DO HEREBY CERTIFY that the same is a true and correct transcript therefrom, and of the whole of the said original Resolution. Given under my hand and the seal of said Company, at the City of New York, this 2d day of October, 1914.

[Seal Fidelity & Deposit Co.]

JAMES R. KINGSLEY,

Attorney in Fact. [174]

FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

STATEMENT—June 30, 1914.

Resources:		Liabilities:	
Home Office Building		Reserve for Unearned	
Charles and Lexington Streets	\$2,375,000.00	Premiums	\$3,383,203.31
Other Real Estate,		Reserve for Claims,	
214 N. Charles St.,		Admitted and Un-	
etc.	128,636.88	admitted	1,950,777.50
Bonds and stocks	6,228,578.62	Reserve for Agents'	
First Mortgage Loans	109,034.00	Commissions	387,805.51
Agents' Debit Bal-		Reserve for Premium	
ances, Gross (Surety)	805,338.02	Taxes, & Expenses	
Agents' Debit Bal-		in Transit	173,972.68
ances, Gross (Casu-		Reserve for Liquida-	
alty)	850,406.41	tion of American	
Bank Deposits for use		Bonding Company.	82,206.24
of Branch Offices..	99,991.45	Reserve for Liquida-	
Cash in Banks and		tion of Philadel-	
Trust Companies..	1,133,122.16	phia Casualty Com-	
		pany	58,114.44
Total	\$11,730,107.54	Reserve for Unpaid	
		Reinsurance Prem-	
		iums	26,215.28
		Capital Stock	
		\$3,000,000.00	
		Surplus	
		\$2,000,000.00	
		Undivided Profits . . .	
		667,812.58	
		Surplus to Policy-	
		holders	5,667,812.58
		Total	11,730,107.54

State of New York,
County of New York,—ss.

James R. Kingsley, being duly sworn, says that he is the Attorney in Fact of the Fidelity and Deposit Company of Maryland; that the foregoing is a true and correct statement of the financial condition of said Company, as of June 30, 1914, to the best of his knowledge and belief, and that the financial condition of said Company is as favorable now as it was when such statement was made.

JAMES R. KINGSLEY.

Subscribed and sworn to before me, this 2d day of October, 1914.

[Seal]

F. A. MASSEY,

Notary Public New York County. No. 2395 [175]

I approve of the within Bond and of the sufficiency of the surety therein.

Dated Oct. 24, 1914.

M. T. DOOLING,

Judge.

[Endorsed]: Filed Oct. 24, 1914. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [176]

*In the District Court of the United States, in and for
the Northern District of California.*

M. E. DITTMAR,

Plaintiff,

vs.

PHOENIX SECURITIES COMPANY (a Corporation),

Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS that the Phoenix Securities Company, a corporation, as principal and Fidelity and Deposit Company of Maryland, a corporation, as surety, are held and firmly bound unto the plaintiff in the above-entitled action, in the sum of five hundred dollars (\$500), lawful money of the United States of America, to which payment well and truly to be made we bind ourselves and each of us jointly and severally and our and each of our successors, representatives and assigns firmly by these presents.

Sealed with our seals and dated this 23d day of October, A. D. 1914.

WHEREAS, the above-named defendant is about to sue out a writ of error in the United States Court of Appeals in and for the Ninth Circuit, to reverse the judgment entered in the above-entitled action in favor of the plaintiff therein and against the defendant therein for the sum of five thousand dollars (\$5,000), and costs of suit amounting to the sum of fifty-eight dollars and twenty cents (\$58.20).

NOW, THEREFORE, the condition of this obligation is such that if the above-named Phoenix Securities Company shall prosecute its writ of error to effect and answer all costs if it shall fail [177] to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

[Seal Fidelity & Deposit Co.]

FIDELITY & DEPOSIT CO. OF MD.

By GUY LEROY STEVICK,

Its Attorney-in-Fact.

Attest: ALFRED C. SKAIFE,

Agent.

PHOENIX SECURITIES COMPANY,

By L. A. REDMAN,

Its Attorney.

Approved October 24, A. D. 1914.

M. T. DOOLING,

U. S. District Judge.

[Endorsed]: Filed Oct. 24, 1914. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [178]

UNITED STATES OF AMERICA.

*District Court of United States, Northern District of
California.*

CLERK'S OFFICE.

No. 14,982.

M. E. DITTMAR,

vs.

PHOENIX SECURITIES COMPANY.

Praeipie [for Transcript of Record].

To the Clerk of said Court:

Sir: Please prepare transcript of Record on Writ

of Error to the United States Circuit Court of Appeals for the Ninth Circuit, as follows:

Fourth Amended Complaint;

Demurrer to Fourth Amended Complaint;

Order Overruling Demurrer to Fourth Amended Complaint;

Answer to Fourth Amended Complaint;

Waiver of Trial by Jury;

Judgment;

Bill of Exceptions;

Petition for Writ of Error;

Assignment of Errors;

Order Allowing Writ of Error;

Bonds on Writ of Error;

Original Writ of Error; and Original Citation.

L. A. REDMAN,

Attorney for Defendant.

[Endorsed]: Filed Nov. 24, 1914. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [179]

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 14,982.

M. E. DITTMAR,

Plaintiff,

vs.

PHOENIX SECURITIES COMPANY (a Corporation),

Defendant.

Clerk's Certificate to Transcript of Record.

I, Walter B. Maling, Clerk of the District Court of the United States, do hereby certify the foregoing one hundred and seventy-nine (179) pages, numbered from 1 to 179, inclusive, to be full, true and correct copies of the records and proceedings as enumerated in the praecipe for transcript of record, as the same remain on file and of record in the office of the clerk of said court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to Writ of Error is \$99.60; that said amount was paid by L. A. Redman, Esq., attorney for defendant; and that the original Writ of Error and original Citation issued in said cause are hereto annexed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 28th day of November, A. D. 1914.

[Seal]

WALTER B. MALING,

Clerk of the United States District Court, Northern District of California.

By J. A. Schaertzer,

Deputy Clerk. [180]

[Writ of Error (Original).]

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the Northern District of California, Second Division, Greeting:

Because, in the record and proceedings, as also in

the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between PHOENIX SECURITIES COMPANY (a Corporation), plaintiff in error, and M. E. DITTMAR, defendant in error, a manifest error hath happened, to the great damage of the said PHOENIX SECURITIES COMPANY (a Corporation), plaintiff in error, as by its complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable EDWARD D. WHITE, Chief Justice of the United States, the 24th day of

October, in the year of our Lord one thousand nine hundred and fourteen.

[Seal]

WALTER B. MALING.

Clerk of the United States District Court, Northern
District of California.

By J. A. Schaertzer,
Deputy Clerk.

Allowed by

M. T. DOOLING.

United States District Judge.

Service of the within Writ of Error and receipt of a copy is hereby acknowledged this 24th day of October, 1914.

MORRISON, DUNNE & BROBECK,

Attorneys for Def. in Error.

The answer of the Judges of the District Court of the United States in and for the Northern District of California, Second Division.

The record and all proceedings of the plaintiff whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal]

WALTER B. MALING,

Clerk.

By J. A. Schaertzer,
Deputy Clerk.

[Endorsed]: No. 14,982. United States District Court for the Northern District of California. Phoenix Securities Company, Plaintiff in Error, vs. M. E. Dittmar, Defendant in Error. Writ of Error. Filed Oct. 24, 1914. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [181]

[Citation on Writ of Error (Original).]

UNITED STATES OF AMERICA,—ss.

The President of the United States, to M. E. Dittmar,
Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the Clerk's Office of the United States District Court for the Northern District of California, Second Division, wherein PHOENIX SECURITIES COMPANY (a Corporation), is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable MAURICE T. DOOLING, United States District Judge for the Northern District of California, this 24th day of October, A. D. 1914.

M. T. DOOLING,
United States District Judge.

Service of the within citation on Writ of Error and receipt of a copy thereof is hereby acknowledged this 24th day of October, 1914.

MORRISON, DUNNE & BROBECK,
Attys. for Def. in Error.

[Endorsed]: No. 14,982. United States District Court for the Northern District of California. Phoenix Securities Company, Plaintiff in Error, vs. M. E. Dittmar, Defendant in Error. Citation on Writ of Error. Filed Oct. 24, 1914. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [182]

[Endorsed]: No. 2525. United States Circuit Court of Appeals for the Ninth Circuit. Phoenix Securities Company, a Corporation, Plaintiff in Error, vs. M. E. Dittmar, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Northern District of California, Second Division.

Filed November 28, 1914.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

*United States Circuit Court of Appeals for the Ninth
Circuit.*

PHOENIX SECURITIES COMPANY (a Corpo-
ration),

Plaintiff in Error,

vs.

M. E. DITTMAR,

Defendant in Error.

**Order Extending Time to File Record on Writ of
Error.**

Good cause appearing therefor, it is ordered that the plaintiff in error in the above-entitled cause may have to and including December 1, 1914, in which to file and docket the transcript on appeal in the United States Circuit Court of Appeals.

Dated November 21, 1914.

WM. C. VAN FLEET,
United States District Judge

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No. 2525

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

PHOENIX SECURITIES COMPANY
(a corporation),

Plaintiff in Error,

VS.

M. E. DITTMAR,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

L. A. REDMAN,
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Filed this.....*day of March, 1915.*

FRANK D. MONCKTON, *Clerk.*

By.....*Deputy Clerk.*

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Statement of the Case.

The material facts in this case are as follows: In the month of October, 1906, Charles Kunze, acting on behalf of the Stauffer Chemical Company and having an interest in the proposed venture of that company, made inquiry of plaintiff (defendant in error) regarding the purchase price of certain mining claims in Shasta County owned by defendant (plaintiff in error). Kunze had been informed (erroneously) that plaintiff was interested in or was the agent of the owners of said claims (Trans. p. 37). Plaintiff told Kunze that he knew the owners of the property, who resided

in New York, that he intended presently to make a trip to New York on other business, and that while there he would call on the owners and get the desired information (p. 39). Kunze testified that at that time the probable price of the claims was discussed and also that the subject of plaintiff's commission in the event of the sale was mentioned (p. 36). Plaintiff testified that nothing was said regarding his commission until after his return from New York (p. 47). Plaintiff went to New York in December, 1906, and while there visited the office of Messrs. Hatch & Clute, defendant's attorneys, several times, and also saw certain officers of defendant. He discussed with them in a general way a sale of the property, but *did not mention the fact that Kunze had requested him to ascertain for what price it could be purchased* (pp. 54-6). He was told by Mr. Hatch that they would be willing to deal on an eighteen months' option for \$75,000 (p. 41). He thereupon left for home promising to correspond with them (p. 56). Upon his return to California, he reported to Kunze that the price of the property was \$75,000, to which he said would have to be added a commission which he suggested to Kunze should be about \$25,000, to be divided between Kunze and himself. It was finally agreed between him and Kunze, the agent of the prospective purchaser and interested with it in the purchase (p. 48), that his commission should be \$10,000 (p. 37), payable by that company out of the purchase price fixed by

them at \$85,000 (p. 105). He thereupon telegraphed Hatch and Clute as follows: "Reliable parties ready to consider summit and adjoining property, price terms named. Answer" (p. 88). Correspondence ensued, and being pressed by Hatch and Clute to name the prospective purchaser, he did so, and stated that he had arranged for a commission of \$10,000 (pp. 97-8). Hatch & Clute, however, assumed that he meant that he wanted a commission of \$10,000 *payable out of the \$75,000*, and they wrote to him that "we are very confident that our clients will not pay a commission to exceed 10% of the amount which they receive in cash or kind, and only when they receive it, and that deducted from that 10% must be any other expenses incident to the transaction so that the client will net out of any sale at least 90% of the purchase money or price" (p. 101). In response to this communication plaintiff informed Hatch & Clute that "I wish to state that I am not expecting you to pay me a commission of 10% on the purchase price of \$75,000. I am taking care of myself over that amount, and have an understanding with the parties having the purchase of the property under consideration for a commission of \$10,000 when the sale is concluded. Now I suggest that the transaction be made direct between the Phoenix Securities Company and the Stauffer Chemical Company for \$85,000, not \$75,000—and that you receive the full \$75,000 cash for the property and give me an agreement to pay

the remaining \$10,000 to me when the money is finally paid and the transfer concluded'' (p. 105). After further correspondence an agreement dated May 1, 1907, was entered into between defendant and the Stauffer Chemical Company whereby said company was given the option to purchase the property within eighteen months for \$85,000 (pp. 129-49). The agreement contains no reference to the payment of a commission in the event of a sale at such a figure. By another provision of the agreement the Chemical Company was given the right to purchase the property within ninety days for \$50,000 plus a commission to plaintiff of \$5000 (p. 146). Plaintiff notified the Chemical Company that he expected to get from it and defendant a contract for the payment of a commission of \$10,000 in case of a sale for \$85,000 (p. 117) but he failed to follow up this notification and no such contract was in fact made by either defendant or the Chemical Company. The Chemical Company did not avail itself of the right to purchase the property for \$55,000 in ninety days, nor did it exercise the option to purchase the property for \$85,000 in eighteen months, but on December 19, 1907, it notified defendant that *it would not purchase the property under the latter option* (the former having expired) and sought and obtained more favorable terms (pp. 149-55)—terms under which *after a lapse of more than eight years* defendant, *if outstanding obligations are paid*, will receive \$66,000, less certain heavy charges and

expenses incident to the transactions necessitated by the new arrangement (pp. 77-86; 73).

Plaintiff filed no less than five complaints in the action. In his earlier pleadings he sued the Stauffer Chemical Company as well as the Phoenix Securities Company, alleging that it was indebted to him for the services alleged to have been rendered at its request. He, however, later dismissed the action as to the Stauffer Chemical Company.

In his last amended complaint plaintiff sets up three different causes of action. In the first count he alleges that

“sometime prior to the first day of May, 1907, defendant * * * made and entered into an agreement with plaintiff by the terms of which said agreement defendant did authorize plaintiff *to find a purchaser for the aforesaid group of mines*; and defendant did further agree that if and when plaintiff should find a purchaser for the aforesaid group of mines who should be *ready, willing and able to purchase the aforesaid group of mines for the sum of not less than \$75,000 net to defendant* and payable upon such terms as might be arranged and satisfactory to defendant that defendant would upon the completion and consummation of such sale pay to plaintiff on account of the services of plaintiff in furnishing such purchaser to defendant such sum of money *in excess of said sum of \$75,000 as said group of mines might be sold by defendant to such purchaser so furnished by plaintiff*”.

It is further alleged in said count of said complaint that plaintiff

“did undertake to find a purchaser for the aforesaid group of mines and on or about the first day of May, 1907, plaintiff did *discover a prospective purchaser for said properties* and did introduce and bring to defendant as such purchaser a certain corporation known as Stauffer Chemical Company, a person who was then and there *willing, able and ready to purchase the aforesaid group of mines from defendant, and did then and there agree to purchase the same and to pay therefor the sum of \$85,000*, provided terms of payment of said sum of \$85,000 could be arranged satisfactory to defendant and to said Stauffer Chemical Company” (pp. 1-3).

In the second count of the complaint it is alleged that defendant authorized plaintiff to find a purchaser for said property *for the sum of \$85,000*, and that plaintiff did find such purchaser and that defendant on February 1, 1908, *sold said property to said purchaser “for the agreed price of \$85,000”*. In this count plaintiff seeks to recover the reasonable value of his services in securing said purchaser which he alleges were worth the sum of \$10,000 (pp. 4-6). In the third count it is alleged that the defendant agreed to pay plaintiff not \$10,000 as a commission, but “ten per cent of such sum of money as *defendant might thereafter actually receive*” on the sale of the property. In this count it is alleged that defendant has received on the sale of the property the sum of \$50,000 and “that although frequently thereunto demanded” defendant has failed and refused to pay to plaintiff the sum of \$5000 (pp. 6-10). (The alleged demand

if made would have been premature in view of the fact that at the time of the commencement of the action defendant had received only \$7950 (p. 35).) The case was tried before the Court sitting without a jury (p. 34) and judgment was rendered in favor of the plaintiff for \$5000. The Court made no findings and delivered no opinion, and we are not advised upon what theory of the case judgment was so rendered. Presumably in view of the amount of the judgment (\$5000) upon the theory that defendant was liable to plaintiff for the "reasonable value" of his services which the Court seemingly appraised at said sum.

Specification of Errors.

1. The Court erred in deciding that defendant authorized plaintiff to find a purchaser for the property referred to in the complaint; and erred in deciding that plaintiff discovered a purchaser for said property; and erred in deciding that said purchaser agreed to pay the sum of \$85,000.00, or any other sum for said property.

2. The Court erred in deciding that defendant authorized plaintiff to find a purchaser for said property for the sum of \$85,000.00, or any other sum; and erred in deciding that on February 1, 1908, or at any other time, defendant sold said property for the sum of \$85,000.00, or any other sum, and erred in deciding that defendant expressly

or impliedly agreed to pay plaintiff any sum whatsoever for his alleged services in procuring said purchaser; and erred in deciding that plaintiff did discover a purchaser for said property, and erred in deciding that plaintiff's services in that behalf were of the value of five thousand (\$5000.00) dollars, or any other sum.

3. The Court erred in deciding that defendant agreed to pay plaintiff ten per cent, or any per cent of such amount as defendant should receive on a sale of said property to the purchaser alleged to have been discovered by plaintiff, or to any one; and erred in deciding that defendant had received \$50,000 on the sale of said property.

4. The Court erred in not rendering judgment in favor of defendant.

5. The Court erred in overruling defendant's objection to the following question propounded to plaintiff:

“Assuming the fact you stated with regard to the nature of these properties and their accessibility and the nature of the agreement which you originally had with the Phoenix Securities Company and the sale that was finally consummated, what in your opinion would be the reasonable value of your services in bringing about the final consummation of the deal?”;

and erred in admitting in evidence the answer to said question as follows:

“I consider under the circumstances the arrangement arrived at as not unreasonable; by the arrangement arrived at I mean that if

the mine developed I would ultimately receive my \$10,000. If it did not, I receive nothing, so to that extent I felt that the reasonable chance I was taking with them probably entitled me to more than the usual ten per cent commission. In the other case where I agreed to ten per cent I believed that if the deal went through in a short time in ninety days or four months or even in six months, I would rather in that case have taken ten per cent than a somewhat larger commission in an indefinite way."

6. The Court erred in overruling the defendant's objection to the following question propounded to the witness Lane:

"I will ask you, Mr. Lane, what, in your opinion, would be the reasonable value of the services of a mining broker in effecting the sale of about 20 or 25 full-sized mining claims in the northern part of this State, and more particularly in Shasta County, the ore in the properties being principally copper, and the properties not being on the railroad, but about seven miles off, and connected with the railroad partly by wagon road and partly by trail; the properties being sold by the broker, or rather, a contract being entered into originally by the broker, or rather, a contract being entered into originally by the broker, for a purchase price of \$85,000 on an eighteen months' contract, with an option that they might be taken in three months' time, for \$50,000 cash, which agreement was subsequently modified by another agreement by which agreement the sellers secured \$2500 cash at the time that the substituted agreement was entered into, and \$33,500 in bonds and \$15,000 in cash, making a total of \$51,000 with \$15,000 remaining unpaid

at the time that the broker made a claim for the reasonable value of his services?";

and erred in admitting in evidence the answer to said question as follows:

"The customary way of paying a commission is a certain percentage on the selling price, and that price on a sale of that kind—that commission—ought not to be less than ten per cent, and ordinarily we get more than that for it—of the selling price."

7. The Court erred in overruling defendant's objection to the following question propounded to the witness Lane:

"And also, Mr. Lane, disregarding the particulars of the agreement that I embodied in the previous question, and bearing in mind simply the nature of the properties that I described, namely, that there were a number of full-sized mining claims, bearing copper ore principally, in the northern part of the State, and situated, as I have stated before, what, in your opinion, would be the reasonable value of the services of a broker in securing the sale of those properties, what percentage?";

and erred in admitting in evidence the answer to said question as follows:

"Well, I should say not less than ten per cent" (pp. 45, 48-50).

Argument.

We will first discuss the claims asserted in the second and third counts of said complaint.

1. Plaintiff seeks to recover in the second count the alleged "reasonable value" of his services in effecting a sale of the property and, as above stated, apparently judgment was rendered in his favor upon this count. But the evidence does not support the claim that the defendant either expressly or impliedly agreed to pay plaintiff the *reasonable value* of the services alleged to have been rendered by him in connection with the sale of the property. If a contract exists between him and defendant, it is *express* not *implied* in respect to his compensation. Now where the agreement is for the payment of a *commission* the question of the *value* of the service rendered by the broker is immaterial. It is contemplated that in many cases brokers will render services for which under the terms of their contracts, they are entitled to nothing. This is necessarily true of all business done on a *contingent* basis. Commissions are deemed to be sufficiently large to cover services rendered in cases where no commissions are earned.

"The broker may devote his time and labor and expend his money with ever so much of devotion to the interests of his employer, and yet if he fails, if without effecting an agreement or accomplishing a bargain, he abandons the effort or his authority is fairly and in good faith terminated he gains no right to commissions. He loses the labor and effort which were staked upon success, and in such event it matters not that after his failure and the termina-

tion of his agency what he has done proves of use and benefit to the principal. In a multitude of cases that must necessarily result. He may have introduced to each other parties who otherwise would have never met. He may have created impressions which under later and more favorable circumstances naturally lead to and materially assist in the consummation of a sale. He may have planted the very seeds from which others reap the harvest; but all this gives him no claim. It was part of his risk that failing himself and not successful in fulfilling his obligation others might be left to some extent to avail themselves of the fruit of his labors. As was said in *Wylis v. Marine National Bank* (61 N. Y. 416): 'In such case the principal violates no right of the broker by selling to the first party who offers the price asked, and it matters not that the sale is to the other party with whom the broker has been negotiating. He failed to find or produce a purchaser upon the terms prescribed in his employment, and the principal was under no obligation to wait longer until he might make further efforts. The failure therefore and its consequences were the risk of the broker only.' "

Sibbald v. Bethlehem Iron Co., 83 N. Y. 378.

"It can not be reasonably said that he was working under an express written contract if he could succeed in fulfilling its terms and under an implied contract if he could not accomplish that desired result. He took the risks of his employment and was subject to the results of failure or success under the provisions of his contract of agency."

Brown v. Mason, 155 Cal. 155 (160).

And what logical basis is there for the claim that *defendant* rather than the *Stauffer Chemical Company* should pay plaintiff the "reasonable value" of services rendered by him? Plaintiff approached defendant at the instance and in the interest of the Stauffer Chemical Company. He concealed from defendant the fact that the Stauffer Chemical Company was seeking to purchase the property and when a contract was sent plaintiff by defendant he took the liberty of making changes in it favorable to the Stauffer Chemical Company, thereby drawing from Hatch & Clute a protest against conduct inconsistent with assumed representation of defendant's interests—an assumption based upon plaintiff's concealment of the truth because he was not seeking *to find a purchaser*, but was seeking to effect a sale in favor of a party (to the exclusion of other purchasers) *who had found him* and from whom he expressly declared he was to get his pay (p. 105). Now why in such circumstances should not plaintiff render his bill to the Stauffer Chemical Company for the "reasonable value" of services rendered?

Plaintiff's claim that he was employed by defendant to find a purchaser is disproved by the evidence and is inconsistent with his relations with the Stauffer Chemical Company. Had he been so employed it would have been his duty to have endeavored to find a purchaser *to the exclusion of the interests of that company*.

Nor does the evidence support the allegation of this count of the complaint that the Stauffer Chemical Company “was then and there *willing, able and ready* to purchase the aforesaid group of mines from defendant and did then and there *agree to purchase the same and to pay therefor the sum of \$85,000*”. The fact is that the Stauffer Chemical Company never agreed to pay \$85,000 for the property. By the agreement of May 1, 1907, it was given an option to purchase said property for the sum of \$85,000, provided it did so within eighteen months (p. 137). It did not exercise this option, but on the contrary notified defendant *that it would not pay said sum* (p. 72). A new contract was thereupon entered into whereby if obligations thereunder of the Chemical Company are kept, it will have paid in 1916 the sum of \$66,000, against which sum are heavy charges arising out of the transaction (pp. 77-86; 73).

It should be borne in mind considering this count of the complaint that the law requires for obvious reasons contracts of the character alleged in the complaint to be in writing.

McCarthy v. Loupe, 62 Cal. 299;

Meyers v. Surryhne, 67 id. 657;

McPhail v. Buell, 87 id. 115;

McGeary v. Satchwell, 129 id. 389;

Jamison v. Hyde, 141 id. 109.

For these reasons we submit that the Court clearly erred in overruling defendant's objections to testi-

mony respecting the "reasonable value" of plaintiff's services (pp. 44, 49-50); and erred in rendering judgment in favor of plaintiff on said second count.

2. The claim made in the third count is equally baseless. Defendant never agreed to pay 10% of the amount received by it on a sale of the property. Mr. Hatch wrote plaintiff that he was quite sure that his clients would not be willing to pay a commission "to exceed 10% of the amount they received in cash or kind and only when they receive it, and that deducted from that 10% must be any other expenses incident to the transaction" (p. 101). Plaintiff, however, asked for no such percentage contract, preferring to *increase* the price named by defendant (\$75,000) to \$85,000 with a view to getting in the contingency of a sale at such a figure a *larger commission* than 10%. He wrote to Hatch & Clute that "I wish to state that I am ^{not} expecting you to pay me a commission of 10% on the purchase price of \$75,000. *I am taking care of myself over that amount* and have an understanding with the parties having the purchase of the property under consideration for a commission of \$10,000 when the sale is concluded" (p. 105). The letter of Mr. Hatch of April 26, 1907, in which he said "you surely have a letter from us that your commissions are to be 10%, and this letter confirms my understanding of it", (p. 124) refers to a commission of 10% *in the event of a sale for \$50,000 within ninety days* (p. 146). But no such percent-

age agreement was in fact made *even in respect to such a contingency*. The agreement of May 1, 1907, provided for a sale for the gross sum of \$55,000, \$5000 of which was to go to plaintiff as and for his commission (p. 146). Nowhere in the correspondence subsequent to plaintiff's statement that he had arranged with the Chemical Company for a commission of \$10,000 is there any suggestion of the payment of a *percentage commission* in the event of a sale after 90 days.

3. There remains for consideration the first count of the complaint. As above stated it is alleged therein that defendant

“did authorize plaintiff to find a purchaser for the aforesaid group of mines; and defendant did further agree that if and when plaintiff should find a purchaser for the aforesaid group of mines who should be *ready, willing and able to purchase the aforesaid group of mines for the sum of not less than \$75,000 net to defendant* and payable upon such terms as might be agreeable and satisfactory to defendant that defendant would upon the completion and consummation of such sale pay to plaintiff on account of the services of plaintiff in furnishing such purchaser to defendant such sum of money in excess of said sum of \$75,000 as said group of mines might be sold by defendant to such purchaser so furnished by plaintiff”.

And it is further alleged that pursuant to the aforesaid authorization and agreement plaintiff discovered a prospective purchaser for said properties, who was then and there

“willing, able and ready to purchase the afore-said group of mines from defendant and did then and there agree to purchase the same and to pay therefor the sum of \$85,000” (pp. 2-3).

If the contract was as alleged in said first count to pay plaintiff as a commission *any sum in excess of \$75,000* received by defendant from a sale of the property, it is obvious that plaintiff is not entitled to recover. For the fact is that the Stauffer Chemical Company never agreed to pay for said property any sum in excess of \$75,000, never has paid any such sum and never will pay it. The option of May 1, 1907, was not an agreement to pay \$85,000 and no such payment was ever made thereunder. The allegation of the complaint that the Chemical Company “did then and there agree” to pay \$85,000 for the property is untrue. Nor did it subsequently “on or about the first day of February, 1908,” or at any time agree to pay or pay \$85,000 for the property, nor anything in excess of \$75,000. The fact is that the total amount which defendant will realize upon said contract, if it is kept by the Stauffer Chemical Company will be, *not within eighteen months*, but after more than *eight years*, \$66,000, less heavy expenses incident to the transaction. What then becomes of plaintiff’s claim based upon an alleged agreement to pay *him the excess above \$75,000* received by defendant for the property?

. The difficulty in which plaintiff finds himself is due entirely to the risk which he voluntarily

assumed, when upon being informed that defendant was willing to sell for \$75,000, he *raised the price* to the purchaser to \$85,000 *with a view to getting a large contingent commission*. Plaintiff sought to make it appear that defendant fixed \$75,000 as its *net* price, but this pretense finds no support in the evidence and is disproved by Mr. Hatch's letter in which he informs plaintiff that his clients would not pay a commission of more than 10% upon the price named (\$75,000). Defendant did not suggest \$85,000 as the price of the property. That figure was made by plaintiff *in order to realize a commission of \$10,000*. He at first without any authority from defendant named \$100,000 as the purchase price, \$25,000 of which he proposed to divide with Kunze (p. 36). It may well be that if plaintiff had named \$75,000 instead of \$85,000 as the purchase price in the option of May 1, 1907, the Chemical Company might have been paid that amount within the eighteen months stipulated therein. And if so and plaintiff had arranged for a *ten per cent commission on its purchase price less expenses* as suggested by Hatch & Clute, it would have been to the advantage of both the defendant and himself. But plaintiff's desire to make a larger winning for himself resulted in no winning at all. A broker and his principal are at liberty to make any agreement they choose respecting the payment of a commission. They may agree that the commission is earned if a contract to purchase is executed, or that it is earned if an option

is given, or they may stipulate that it shall be paid only when the money agreed to be paid has in fact been paid, or that it shall be dependent upon any other specified contingency. The election of the Stauffer Chemical Company not to purchase the property under the option agreement of May 1st is determinative of plaintiff's right to a commission *which according to his complaint was to be the excess above \$75,000 paid by that company.* No claim is made, and if made would be without support in the evidence, that there was any collusion between defendant and the Stauffer Chemical Company to defraud plaintiff of a commission. There is no suggestion of anything of the kind. Defendant *was anxious that the option to take the property would be exercised by the Chemical Company* and only consented to a different and far less favorable proposition when it was notified by the Chemical Company *that it would not take the property* upon the terms stated in the option agreement. *Defendant had no reason to doubt the good faith of this statement, and was therefore justified in acting upon it.* The contingency then, upon which plaintiff's claim to a commission rested never occurred. The fact that a sale thereafter was made is immaterial. *Plaintiff did not bargain for compensation for his services regardless of what the property sold for.* He gambled upon a sale for \$85,000—a figure named by himself—and he lost. In his letter to Mr. de Guigne, the president of the

Chemical Company, under date of April 20, 1907 (defendant's exhibit 14) he wrote:

"I wish to state also that in addition to signing up contracts between ourselves, I shall expect a contract concurred in by both yourself and the Phoenix Securities Company, to pay me the \$10,000 commission decided upon in case the property is acquired at the gross price of \$85,000 on the eighteen months' option—and in case it is acquired for a lesser amount in shorter time then I am to receive 10% of the purchase price" (p. 117).

No such contract was in fact executed. But assuming that it was, the fact is that the property was not acquired at the gross price of \$85,000 on the 18 months' option, nor for a lesser amount in shorter time. Now upon what principle of law may plaintiff without the consent of the other parties to the arrangement modify it so that he may recover a commission of \$10,000 in a specified contingency or *another unspecified commission in a contingency not mentioned?* *Non constat* the other parties would not have been willing to pay as much as \$10,000 in the one event *if in another less favorable contingency they would also be obliged to pay a commission.* As well might plaintiff argue that he was to be paid \$10,000 in case the property was purchased for \$85,000 in eighteen months *and that he was to be compensated for services rendered even if no sale at all was made.* Services rendered in cases where no commissions are earned are deemed to be paid for by commissions received in other cases where the services rendered may be and

usually are of less intrinsic value than the amount of the commission received. Where a broker is working on a commission basis the question of the value of his services whether he succeeds or fails is a false quantity. His losses in some cases are presumably equalized by his gains in others. Quoting again from *Sibbald v. Iron Co., supra*:

“It follows as a necessary deduction from the established rule that a broker is never entitled to commissions for unsuccessful efforts. The risk of failure is wholly his. The reward comes only with his success. That is the plain contract and the contemplation of the parties. The broker may devote his time and labor, and expend his money with ever so much of devotion to the interests of his employer, and yet if he fails, if without effecting an agreement or accomplishing a bargain, he abandons the effort, and his authority is fairly and in good faith terminated, he gains no right to commissions. He loses the labor and effort which was staked upon success. And in such event it matters not that after his failure and the termination of his agency what he has done proves of use and benefit to the principal. And in a multitude of cases this must necessarily result. He may have introduced to each other parties who would otherwise have never met; he may have created impressions which under later and more favorable circumstances naturally lead to and materially assist in the consummation of a sale; he may have planted the very seeds from which others reaped the harvest; but all that gives him no claim. It was part of his risk that failing himself and not successful in fulfilling his obligations others might be left to some extent to avail themselves of the fruit of his labors.”

In the case of *Rees et al. v. Spruance*, 45 Ill. 308, which is somewhat analogous to the case at bar the Court in denying plaintiffs any relief said that:

“The defendant it is true found a purchaser through information furnished by the broker and would seem to be under a moral obligation to give him a reasonable compensation for the services thus rendered.”

But for the reasons above pointed out we submit that this is an erroneous view. If brokers have a moral claim for services rendered regardless of the contingencies specified in their contracts then by the same reasoning they should *reduce* their commissions to correspond with the intrinsic value of the services rendered. A broker may earn by turning his hand over a commission of many thousands of dollars, and in such a case he would not favorably entertain a suggestion that he was under any moral, legal or other obligation to remit any part of his commission.

Assuming in the case at bar that the Stauffer Chemical Company had paid \$85,000 for the property within eighteen months will anyone say that the *reasonable value* of the services rendered by plaintiff was \$10,000? Would not plaintiff have been willing and anxious to render the same service for one-tenth of that amount, or even less, if the lure of a large contingent commission had been removed? He was not employed by defendant to find a purchaser as he alleges in his complaint, nor did he find a purchaser. The purchaser *found him*

(a fact which he concealed from defendant) and requested him to render the simple service of ascertaining what the property could be purchased for. This could have been ascertained by the purchaser himself, but he went to the plaintiff in the mistaken belief that plaintiff was a part owner of the property or the agent of the owner (p. 37). Nor was it necessary to go to New York to ascertain what plaintiff learned while there. A letter would have sufficed. And he delayed going until other business required his presence there (p. 39). He asked for no *compensation* for his trouble, but set about to figure how he could earn a large *contingent commission*. His counsel contend that he represented the defendant in the transaction. But the truth is that he represented himself. He was not frank in his dealings with the officers and attorneys of the defendant while in New York. He did not disclose to them the real situation and intentionally refrained from mentioning the subject of commission until he returned to California. He then without consulting them advised Mr. Kunze that the "net" price of the property was \$75,000 (which was not so) and suggested that a gross figure of \$100,000 be named in order that a commission of \$25,000 might be realized (p. 38). He finally *without consulting defendant* fixed the gross figure at \$85,000. After this had been arranged by him, not as a representative of defendant, *but in his own interest*, he telegraphed to Hatch & Clute that "*reliable parties* ready to consider Sum-

mit and adjoining properties. Price terms named. Answer" (p. 88)—a communication that "mystified" Mr. Hatch (p. 89). Subsequently, on February 18, 1907, plaintiff notified defendant that the Stauffer Chemical Company was the purchaser; that it was willing to pay \$75,000 for the property and that his "commission in the deal will amount to \$10,000". He did not as a representative of defendant should have done negotiate for a commission *on the selling price*, but he arbitrarily added to the selling price a commission as if this was a matter with which defendant had no concern. He refers to \$75,000 as defendant's "price" and \$10,000 as his "commission". Hatch & Clute, however, assumed that he meant that the \$10,000 was to be paid out of the \$75,000 named by them, and wrote to him that they were

"very confident that our clients will not pay a commission to exceed ten per cent of the amount which they receive in cash or kind and only when they receive it and that deducted from that ten per cent must be any other expenses incident to the transaction" (p. 101).

To which plaintiff replied:

"I wish to state that I am not expecting you to pay me a commission of ten per cent on the purchase price of \$75,000. I am taking care of myself over that amount and have an understanding with the parties having the purchase of the property under consideration for a commission of ten per cent when the sale is concluded" (p. 105).

As plaintiff had disclosed to the Stauffer Chemical Company the fact that defendant was willing to sell for \$75,000 *he put it out of the power of defendant to ask more even if the Chemical Company had been willing to pay \$100,000.* Acting in his own interest he so shaped the matter as to compel defendant to acquiesce in the payment of a larger commission than otherwise it would have consented to. *He did not try to get the best figure possible for the defendant* but he used his knowledge of defendant's price to provide a large commission for himself. By pursuing this course he jeopardized the sale and brought a loss upon both the defendant and himself. If ever there was a case where a man made his bed and should lie in it, this is that case.

Payseno v. Swensen et al., 178 Fed. 999, is directly in point. In that case the brokers had a contract whereby they were to receive a commission of fifty cents per acre for land sold at a specified price. An exchange of lands was arranged with parties produced by the brokers. The Court said in ruling that plaintiff was not entitled to recover:

"There [referring to the case of *McMillin vs. Beves*, 147 Fed. 218] it was said that the broker was entitled to a commission though the contract was made upon modified terms. But as I said before that must be construed with reference to the precise case which is under discussion. In that case the jury could find and the Court may very well hold that by virtue of the contract when the proposed purchaser was

introduced to the owners of the bonds they agreed to pay a commission to the broker whether the sale was made upon the terms asked or not. * * * I do not see how a real estate broker stands upon any other basis than any other contractor, and unless he fulfills his contract and produces a purchaser who is willing to pay upon the terms named, he cannot recover. Who knows whether the defendants in this case would have been willing to pay a commission of fifty cents an acre if they received \$8 instead of \$10 an acre for the land?"

The case of *Holcomb v. Stafford*, 113 N. W. 449, cited with approval in the *McMillin* case, *supra*, is on all fours with the case at bar. In that case the agreement with the broker was that he should receive a commission whatever the property was sold for to a purchaser produced by him in excess of a stipulated sum. The property was sold at the net price. The Court decided that the broker was not entitled to recover either a commission *or the value of his services*. In the case at bar plaintiff himself alleges that the commission was dependent upon a production of a purchaser who was "*ready, willing and able*" to pay a sum *in excess of \$75,000*, for the property. Now there is no evidence that the Stauffer Chemical Company was willing to pay in excess of \$75,000 for the property. On the contrary, the evidence is that it was *not willing* to pay such sum, and under the arrangement finally entered into with defendant, defendant will receive very much less than \$75,000. The fact that the Stauffer Chemical Company had the right under the agreement of

May 1, 1907, to purchase for \$85,000 is immaterial (*Lawrence v. Pederson*, 34 Wash. 1). The acceptance of such an option indicates merely that that company was willing to consider a purchase at that figure, not that it was willing to pay it. And upon consideration it concluded not to take the property under the option and did not do so. Hence plaintiff is not entitled to recover.

Ames v. Lamont, 83 N. W. 780;

McArthur v. Slauson, 9 id. 784.

If the judgment in this case is permitted to stand, it will write a new chapter into the law of brokerage, and one which will cause no end of mischief. Clearly, such a recovery cannot be based upon contract, much less the alleged contracts pleaded in the complaint. It partakes of the nature of damages involving an unwarranted restriction of the rights of an owner and constitutes a virtual confiscation of a portion of his property or its equivalent. In vain will the record and the authorities be searched to find either a stated or sound theory of the evidence or the law upon which to compute or sustain the recovery.

4. As the Court made no findings of fact the record fails to show which of the three counts in the complaint was intended to be sustained by the judgment. As above stated, however, the amount of the judgment indicates that the Court found against the plaintiff in respect to the first and third counts and awarded him judgment under

the allegations of the second count which proceeded upon *quantum meruit*. Had the first count been sustained, the judgment would have been for \$10,000; or had the third count been sustained the judgment would have been for 10% of \$7950.00, the amount paid by the Stauffer Chemical Company prior to the commencement of the action, or for 10% of \$51,000, the amount paid at the time of the trial (p. 35). And moreover as we have shown, the evidence does not sustain the first or third counts. But it is not incumbent upon defendant to establish that the judgment rests upon the second count in order to secure a reversal. If, as we contend, *the Court erred in admitting evidence relating to the reasonable value of plaintiff's services*, the judgment must be reversed even if the first or third count was sustained by the evidence, because, as was held in *St. Lewis Railway Co. v. Needham*, 63 Fed. 107 (114):

“A general verdict cannot be upheld where there are several issues tried and upon any one of them error is committed in the admission or rejection of evidence, or in the charge of the Court, because it may be that the jury founded their verdict upon the very issue to which the erroneous ruling related and that they were controlled in their finding by that ruling.”

To the same effect see, also,

Maryland v. Baldwin, 112 U. S. 490;

What Cheer Coal Co. v. Johnson, 56 Fed. 810 (813);

Creswell etc. Co. v. Martindale, 63 Fed. 84 (90);

Lyon, Potter & Co. v. 1st Natl. Bank, 85 Fed. 120 (125);

Durant Mining Co. v. Percy Consolidated Mining Co., 93 Fed. 166 (169);

Fireman's Fund Insurance Co. v. McGreevy, 118 Fed. 415 (419).

It follows necessarily that plaintiff is in no better position than if he had sued upon the second count alone; and if, as we think we have demonstrated in the foregoing argument, plaintiff is not entitled to recover upon a *quantum meruit* (and hence that the Court erred in admitting evidence as to the reasonable value of his services), the judgment must be reversed.

Dated, San Francisco,

March 6, 1915.

Respectfully submitted,

L. A. REDMAN,

Attorney for Plaintiff in Error.

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No. 2525

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PHOENIX SECURITIES COMPANY

(a corporation),

Plaintiff in Error,

vs.

M. E. DITTMAR,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

MORRISON, DUNNE & BROBECK,
Attorneys for Defendant in Error.

R. L. McWILLIAMS,
Of Counsel.

Filed this.....*day of March, 1915.*

Filed FRANK D. MONCKTON, *Clerk.*

By.....*Deputy Clerk.*

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BRIEF FOR DEFENDANT IN ERROR.

Introduction.

It will be observed from the transcript in this case that the action was tried without a jury, a jury having been duly waived in writing. That after the introduction of his evidence by the defendant in error, the plaintiff in error proceeded to introduce its evidence; that "the case was thereupon, after argument, submitted to the court for decision and judgment and thereafter and on August 26, 1914, the court ordered judgment to be entered in favor of plaintiff against defendant for the sum of \$5000 and costs of suit, and judgment accordingly was entered upon said day" (Tr. p. 156).

It will also be observed that of the thirty (30) alleged errors assigned by appellant, all but three of them are based upon the alleged insufficiency of the evidence to support certain of the implied findings of the court.

The first assignment is based upon the alleged error of the lower court in rendering a judgment in favor of respondent and in not rendering a judgment in favor of appellant.

The last two assignments are based upon the alleged error of the court in overruling the objections interposed by plaintiff in error to two questions propounded to one of respondent's witnesses.

We submit that under these circumstances it is not within the province of this court to review the sufficiency of the evidence. As stated in the recent case of *Tiernan v. Chicago Life Insurance Company* (214 Fed. R. 238; C. C. A. 8th Circ.):

“It is a rule so well settled as not to require the citation of authority that, when an action at law is tried by a court upon a written waiver of a jury, the sufficiency of the evidence to support the judgment will not be reviewed by an appellate court in the absence of a request by the complaining party at the close of the evidence for a finding or judgment in his favor or special findings by the trial court of the facts established.”

In this case, the sufficiency of the evidence not having been challenged at the close of the case by a motion by plaintiff in error for a finding or judgment in its favor, and no special findings having

been made by the court, the case clearly comes within this rule and hence the alleged insufficiency of the evidence is not subject to review.

The same rule is thus stated by the Circuit Court of Appeals of the Seventh Circuit (*Streeter v. Sanitary District of Chicago*, 133 Fed. R. 124, 127), after citing a number of cases:

“The result of the rulings in these cases is that, if the finding be general, the review is limited to the rulings of the court in the progress of the trial. If the findings be special, the review may extend to the determination of the sufficiency of the facts found to support the judgment. No other or different review is permitted. The special finding of the statute is not a mere report of the evidence, but is a finding of those ultimate facts upon which the law must determine the rights of the parties. If the finding be general, only such rulings of the court in the progress of the trial can be reviewed as are presented by the bill of exceptions, but in such case a bill of exceptions cannot be used to bring up the whole testimony for review, any more than on a trial by jury.
* * * *There being then only a general finding, and no agreed statement of facts, inquiry upon review must be limited to the sufficiency of the declaration and to the rulings during the progress of the trial.*” (Italics ours.)

The same rule has been enunciated in this circuit (*Blanchard v. Commercial Bank of Tacoma*, 75 Fed. R. 249).

The first assignment of error, that the lower court erred in rendering judgment in favor of respondent and not rendering judgment in favor

of the appellant, cannot be urged for the same reason. No motion having been made by plaintiff in error for a finding or judgment in its favor, the assignment will not be considered by the court.

Accordingly, no objection being made by plaintiff in error to the sufficiency of respondent's complaint, the only questions left for review by this court are the rulings of the lower court on the two questions asked by defendant in error of one of his witnesses.

We submit that plaintiff in error is not in a position to urge its objections as to those rulings because the ground of objections, if any particular ground was specified, does not appear (Tr. pp. 44, 49).

The rule here involved has thus been stated (*Merchants' Inc. Co. v. Buckner*, 110 Fed. R. 345, 346; C. C. A. Sixth Circ.):

"It is next urged that it was error to permit evidence of the good reputation of defendants in error, no attack having been made upon their reputation by the plaintiff in error at the trial. We find it unnecessary to pass upon this proposition, in view of the state of the record. The exceptions to the admission of testimony of this class are general in their character, failing to point out the ground of exception. It is well settled in the federal courts that such exceptions fail to afford a proper basis for review in an appellate court. The ground of the exception should be disclosed, in order that the court may act understandingly, and correct the error if one has been made. *Railroad Co. v. Hellenthal*, 31 C. C. A. 414,

88 Fed. 116; *Burton v. Driggs*, 20 Wall. 125, 22 L. Ed. 299; *Toplitz v. Hedden*, 146 U. S. 252, 13 Sup. Ct. 70, 36 L. Ed. 961."

Also see

Simkins' Federal Suit at Law, p. 183.

This rule is based upon the well-established doctrine that error will not be presumed but must affirmatively appear in the record.

Statement.

Without waiving these objections to a review of the evidence, we will briefly go over the evidence offered at the trial for the purpose of showing that even if the questions raised by plaintiff in error were subject to review, the lower court did not err in rendering judgment for the defendant in error.

The statement made by the appellant, although substantially correct, is somewhat inadequate to a full appreciation of the facts involved.

It appears that the negotiations for the sale of the property of plaintiff in error began by one Mr. Charles Kunze calling upon the defendant in error, Mr. Dittmar, at Redding, California, about the latter part of November, 1906 to inquire regarding the mining properties involved. Mr. Dittmar informed Mr. Kunze that he thought that the properties could be purchased and having himself origi-

nally sold them to the Phoenix Securities Company suggested that they could probably be had for about \$75,000 (Tr. p. 41).

Shortly thereafter, Mr. Dittmar went to New York, and there conferred with Mr. Edward S. Hatch of the firm of Hatch & Clute, representing the plaintiff in error, together with certain of the officers of that company. The result of his interview was that the company agreed to sell its mining properties on an eighteen months option for \$75,000, and to allow Mr. Dittmar whatever sum he could get above that as his commission (Tr. p. 41). Upon the return of Mr. Dittmar to California he saw Mr. Kunze, representing Stauffer Chemical Company, the prospective purchaser, and stated that the property could be purchased for \$75,000, to which would be added \$10,000 as his commission (Tr. p. 42). Mr. Dittmar in his letter, dated February 18, 1907 (Tr. p. 97), informed plaintiff in error of the name of the prospective purchaser and stated that "My commission in the deal will amount to \$10,000 and as the buyers know your price and understand that I am to receive a commission of \$10,000 when the deal is consummated, it will no doubt be best to make the transfer direct from the Phoenix Securities Company to the Stauffer Chemical Company and at the same time to give me an agreement for \$10,000 and authorize the Bank of Shasta County holding the escrow papers to receive \$75,000 for your credit and the remaining \$10,000 for myself." Before Mr.

Dittmar received a response to that letter, the proposition was made to him by the Stauffer Chemical Company of a reduced price in the event that the latter company decided to purchase the properties for cash or its equivalent. Mr. Dittmar accordingly wrote to the Phoenix Securities Company suggesting such a reduction and recommending that a cash price of \$50,000 be made and stating that "so far as my commission is concerned under this proposed clause it can be left in the same proportion as under the general terms of the bond" (Tr. p. 100).

In response to these two letters of defendant in error, the Phoenix Securities Company by Messrs. Hatch & Clute answered in a letter dated February 25, 1907 (Tr. p. 101): "We are very confident that our clients will not pay a commission to exceed ten per cent. of the amount which they receive in cash or kind, and only when they receive it, and that deducted from that ten per cent. must be any other expenses incident to the transaction, so that the client will net out of any sale at least 90% of the purchase money, or price."

In response to that letter defendant in error wrote to Messrs. Hatch & Clute on March 6th (Tr. p. 104) calling attention to the fact that he was not expecting a commission on the purchase price of \$75,000, but that the purchaser had agreed to pay \$85,000 with the knowledge that \$10,000 of this was to be retained by Mr. Dittmar for his

commission. He further states in that letter that, "In case the parties taking the bond make an offer to conclude the deal in ninety days or so and under the circumstances receive a discount on the purchase price then I will be willing in that case to receive 10% of whatever amount is agreed upon."

In Mr. Dittmar's letter of March 13th (Tr. p. 108) he repeats to Messrs. Hatch & Clute, that, "You will note that I am not asking for any commission out of the \$75,000 as agreed upon between us", and asks that the escrow instructions of Messrs. Hatch & Clute to the Bank of Shasta County provide "to pay me \$10,000 when the deal is concluded, or in case the deal is concluded earlier on a discount basis, the instructions should read that I am to receive 10% commission of the amount involved in the transaction."

Any doubt that may theretofore have existed in the minds of the representatives of the Phoenix Securities Company as to the amount of commission expected by Mr. Dittmar must certainly have been dissipated by these letters from him. With a clear and definite knowledge of what he expected in the way of a commission the plaintiff in error proceeded to the consummation of the contract of sale with the purchaser procured by him.

To preclude any possibility of such misunderstanding on the part of the Phoenix Securities Company we have in evidence the letter of Mr. Dittmar to Mr. C. de Guigne, president of the

Stauffer Chemical Company dated April 20, 1907 (Tr. p. 115), of which Mr. Dittmar sent a copy to the Phoenix Securities Company, referring to his commission of \$10,000 in the event that the property was purchased for \$85,000, or "in case it is acquired for a lesser amount in shorter time than I am to receive 10% of the purchase price".

In response to the suggestion of Mr. Dittmar that his commission be segregated when the money was paid, Mr. Hatch wrote on April 26, 1907 (Tr. p. 117), objecting to the adoption of such a method since "that is liable to be taken as a reflection upon us", and further that "I doubt if they (Phoenix Securities Company) would consent to what I certainly never would consent to and that is *to have anybody else pay my bills for me.*" This letter clearly shows who Mr. Dittmar was acting for. Mr. Hatch further states in that letter that he hopes that Mr. Dittmar's meaning is that the 10% commission asked by him in the event that the property is sold for \$50,000 is to be paid by the Stauffer Chemical Company over and above that sum. Such uncertainty, however, as to the amount of the commission in the event that the property was sold for \$50,000, assuming that it existed in his mind, is immaterial since the option to purchase within 90 days was not exercised by the Stauffer Company.

The last letter of Mr. Dittmar to Hatch & Clute offered in evidence, dated May 4, 1907, renders it

absolutely certain that Messrs. Hatch & Clute, as the representatives of the plaintiff in error, knew clearly and distinctly what Mr. Dittmar was expecting in the way of a commission and from whom he was expecting to receive it. Says Mr. Dittmar (Tr. p. 127): "The price fixed to the Stauffer Chemical people was based on \$75,000 net to yourselves as discussed while I was in New York; to this price I have added \$10,000 as my commission based on an 18 months' contract. This, of course, is a little over 10% but in the sale of mining properties a much larger commission is usual than in ordinary sales unless an outright purchase is made, in which event, the commission is usually based on the amount of money expended in the transaction. If a deal is very large the commission is frequently lower. In case the sale is concluded in the course of a few months for a lower figure than under the time arrangement covering 18 months, then I am willing to accept ten per cent. or a smaller commission percentage than if I must wait for the deal to be consummated 18 months hence."

It is thus clear that the agreement between the parties at this time was for a commission to Mr. Dittmar of \$10,000 in case of a sale as originally planned for \$85,000 or 10% in case of a cash sale for a lesser amount than originally contemplated. An agreement embodying these terms between the Stauffer Chemical Company and Phoenix Securities

Company, plaintiff in error, was accordingly drawn up as of May 1, 1907 (Tr. p. 129).

Thereafter, and on December 19, 1907, and during the life of the 18-months' option, the Stauffer Chemical Company approached the Phoenix Securities Company, with a statement that conditions in connection with the properties covered by the option were not as favorable as that company had anticipated and stating that "they wanted to *change* the option contract into some other arrangement or some definite contract" (Tr. p. 69). "Thereupon", says Mr. Hatch, "We negotiated together for two or three hours, resulting in a tentative understanding between Mr. Kunze and myself" that the property should be conveyed to a new corporation to be organized for the purpose. This understanding and agreement is embodied in a letter (Tr. p. 149) of Messrs. Hatch & Clute to the Stauffer Chemical Company dated December 27, 1907 [which letter was subsequently taken by the parties as constituting the modified contract (Tr. p. 69)], in which the incorporation and organization of a "dummy" company are outlined and the method of sale of the properties covered by the option contract are set forth. The modified agreement provided for the payment of \$85,000 as in the option contract (Tr. pp. 152, 3), \$2500 of which was to be paid in cash, \$37,500 in bonds of the "Dummy Company", and \$45,000 being represented by an ore contract. This agreement was carried out and payments made under it amounting up to the time of trial to

\$51,000 (Tr. p. 35); \$2500 was paid in cash at the time of the making of the agreement (Tr. p. 78); \$33,500 represented by the bonds of the "Dummy Company" was paid by the Stauffer Chemical Company (Tr. p. 82), the remaining \$4000 of the bonds being remitted by the Phoenix Securities Company in consideration of the Stauffer Chemical Company "agreeing to pay the balance of the bonds on which it was not a guarantor" (Tr. p. 82). The ore contract for \$45,000 was "liquidated in July, 1911, between its then holder and owner, being an assignee of one of the creditors, at the sum of \$30,000 for which the Summit Copper Company gave its notes" (Tr. p. 83). One of these notes, dated August 1, 1911, was duly paid (Tr. p. 83) and two of which, according to the testimony of Mr. Jentzen, have been paid by the Stauffer Chemical Company since that time (Tr. p. 35), leaving three of the notes, amounting to \$15,000 still at the time of the trial undue and unpaid.

Argument.

It is thus evident in our opinion that defendant in error, if not entitled to the whole sum of \$10,000 was at least entitled to judgment for the reasonable value of the services rendered by him.

We will freely concede that if Mr. Dittmar, upon securing the execution of the option agreement had then insisted that his commission was due,

such claim would have been without foundation. We do not base our case upon the mere execution of such option agreement. What we do contend is this: Mr. Dittmar first effected a contract between the parties whereby plaintiff in error bound itself to sell the property in question to the Stauffer Chemical Company for the sum of \$85,000 and agreed for a consideration to hold such offer open for 18 months to permit the Stauffer Chemical Company in the meantime to explore the lands and determine whether or not it cared to exercise the option. The Stauffer Chemical Company accordingly proceeded to operate the mines upon the lands in conformity to the agreement, and decided *during the life of the option* that the terms proposed were too onerous. It accordingly took up the matter of a “change” (Tr. p. 69) in such terms. It was thereupon in the discretion of the plaintiff in error to permit such change, or to refuse the request. Had the Phoenix Securities Company refused to alter the terms of the original agreement, it is possible that the Stauffer Chemical Company would have reconsidered its decision to abandon the project and would have consummated the option contract. Or, had the Phoenix Securities Company referred the matter to Mr. Dittmar, he, by reason of his superior knowledge of conditions, might have persuaded the latter company to consummate the purchase on the original terms.

Undoubtedly, had the Phoenix Securities Company refused to make an alteration of the terms

requested by the Stauffer Chemical Company and the deal had fallen through, Mr. Dittmar would have been entitled to nothing. But plaintiff in error decided to, and did, accept the modifications suggested by the representative of the Stauffer Chemical Company without giving defendant in error an opportunity to use his efforts to procure the consummation of the original contract. It is noteworthy that the substance of these changes was agreed upon the very day that Mr. Kunze, representing the purchaser, requested them. As Mr. Hatch expresses it (Tr. p. 69), "We negotiated together for two or three hours resulting in a tentative understanding * * * and subsequently the details, with some changes and modifications, were reduced to writing." In other words, the negotiations were not broken off, in which case defendant in error might not have been entitled to recover anything, but instead no sooner was the request for a modification made, than it was in substance accepted. When it is said that a broker is not entitled to a commission because the prospective purchaser refuses to accept the terms offered and subsequently new terms are agreed upon between him and the owner, the broker's right to a commission depends, as has been rightly stated in one of our federal courts, "on the continuity of the transaction."

In re Breon Lumber Co., 181 Fed. R. 909,
citing 19 Cyc. 251.

It will be noted that the purchase price under the modified agreement was the same as under the option agreement, \$85,000. The only difference was in the manner of its payment. Whereas, the original option contract called for the payment of \$85,000 on November 1, 1908, in the event that the option was accepted, the new contract provided for the payment of \$2500 in cash, \$37,500 in bonds, and the balance on a royalty agreement.

There was no time fixed within which Mr. Dittmar was obliged to effect the consummation of the sale, except the implied requirement of a reasonable time. In view of the fact that the option agreement granted the Phoenix Securities Company 18 months within which to consider the purchase and the modified contract was effected within a few months of the execution of such option agreement and during its life, certainly the objection cannot be made that Mr. Dittmar did not procure a customer within a reasonable time.

The case at bar clearly came within the doctrine laid down by the Supreme Court of Virginia in *Ice v. Maxwell*, 55 S. E. 899, 900:

“Where an agent contracts to furnish a purchaser for lands at a stipulated price and such agent does furnish a purchaser whom the owner accepts, and, in the negotiations of the transaction the owner agrees upon and accepts a different price from that at which the agent was instructed to sell, still such agent would be entitled to his compensation. It cannot be said that where an agent has procured a purchaser for a piece of property the owner can

deprive him of his commission or compensation by accepting such purchaser and agreeing to take a less sum than the agent agreed to furnish a purchaser for. * * * 'Where by a special contract a broker is not to be paid commissions unless he sells the property at a stipulated price, the sale by him at such a price is a condition precedent to his right to compensation *unless pending the negotiations and whilst the agency remains unrevoked the owner consents to a sale at a different price.* (Italics ours.) If a broker introduces the purchaser or discloses his name to the seller and through such introduction or disclosure negotiations are begun and the sale of the property is effected, the broker is entitled to his commission although in point of fact the sale may have been made by the owner. Where property is sold at a particular price with the consent of the owner, the broker who effected the sale is entitled to his commissions although he may not have been requested by the owner to sell at that price under an agreement to pay commission.'"

The Circuit Court of Appeals of the Third Circuit has thus stated the rule:

"The real questions, presented in this class of cases are, was there an employment of the broker and if so was he the efficient or procuring cause of the sale? These facts once established it is of no consequence whatever whether the broker was present or absent at the conclusion of the same, *or whether the same was concluded upon the same or different terms than those originally proposed* (Italics ours) or whether or not the principal had knowledge of the broker's agency in procuring the customer."

Colonial Trust Co. v. Pacific Packing and Navigation Co., 158 Fed. R. 277, 281.

Also to the same effect see:

Headley v. Savings Bank of Danbury, 42

Atl. 667; 44 L. R. A. 321 (Conn.);

Jones v. Henry, 36 N. Y. Suppl. 483;

Stewart v. Mather, 32 Wis. 344;

McDonald v. Cabiness, 102 S. W. 721 (Texas 1907);

French v. McKay, 60 N. E. 1068 (Mass. 1902);

McMillin v. Beves, 147 Fed. R. 218 (C. C. A. 1906);

Wilson v. Sturgis, 71 Cal. 226;

Boland v. Ashurst Co., 145 Cal. 405.

The fact that the plaintiff in error agreed voluntarily to remit \$4000 from the purchase price under the modified agreement and that it discounted the ore contract in order to satisfy its creditors certainly cannot react to the injury of defendant in error.

“The services of a realty broker are fully performed and his commission fully earned when the sale of the property is completed or when he has procured a purchaser ready and willing to enter into a valid contract of sale upon the terms fixed by the owner. (*Dolan v. Scanlan*, 57 Cal. 261; *Gunn v. Bank of California*, 99 Cal. 349 (33 Pac. 1105); *Brown v. Mason*, 155 Cal. 155, 21 L. R. A. (N. S.) 328 (99 Pac. 867). The fact that the purchaser in the present case subsequently defaulted in his payments of the purchase price of the land sold was no concern of the plaintiff’s assignors. That fact could not operate to deprive them of the commissions due for their services rendered in procuring a pur-

chaser for the defendant's land, who was willing and at the time was able to buy the property, and who did actually enter into a valid contract of sale at the price and upon the terms specified by the defendant. After a sale of real property has been completed the default or insolvency of the purchaser procured by the broker will not defeat the recovery of the latter's commission. (*Shainwald v. Cady*, 92 Cal. 83 (28 Pac. 101); *Benedict v. Wilson*, 10 Cal. App. 719 (103 Pac. 350)."

Root v. Greadwohl, 20 Cal. App. 141.

As suggested before, a judgment for defendant in error for the full \$10,000 would have been proper under the decisions cited herein. Clearly the least that he should have been held entitled to is \$5000, which sum the lower court evidently found was the reasonable value of the services rendered by him.

Certain minor matters are referred to by plaintiff in error as grounds for its contention that the judgment rendered was erroneous. Thus it is suggested that there was no express employment of Mr. Dittmar by plaintiff in error. Even if such were the case such express employment is unnecessary as the court said in one of the cases relied upon by counsel (*Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 378):

"Nor do we see any fault in the charge of the court in this connection that it was immaterial whether the broker was originally employed or whether after he had brought the thing about the principal availed himself knowingly of the fruits of the action of the broker. This is only saying that the contract of employ-

ment may be established either by proof of an express and original agreement that the services should be rendered or by facts showing in the absence of such express agreement a conscious appropriation of the labors of the broker."

The following statement by that court is also significant:

"Indeed, the learned counsel for the defendant very fairly and justly concedes that the contract may be established in some cases 'by the mere acceptance of the labors of a broker'."

It is claimed that the fact that Mr. Dittmar approached plaintiff in error "at the instance" of the Stauffer Chemical Company is fatal to his claim. The law, however, is otherwise. In the case of *Lawler v. Armstrong* (102 Pac. 775, Wash. 1909) in which case such a contention was made, the court held that a broker was entitled to his commission notwithstanding that fact and notwithstanding the further fact that the sale was not consummated for cash as the broker's instructions required where the terms finally agreed upon were approved by the owner.

It is further objected by plaintiff in error that Mr. Dittmar "took the liberty of making changes" in the original contract favorable to the Stauffer Chemical Company. Mr. Dittmar's explanation of this is simply that "such change or modification will be to the interest of all parties concerned". "You will understand" concludes Mr. Dittmar in that letter that "I know conditions in this district

very thoroughly and would not exact anything that is unreasonable on the one hand, nor would I be willing to be a party to a contract that would exact unreasonable things from myself" (Tr. p. 114).

That the suggestions of certain alterations in the contract are not to be taken as an indication that he was representing the Stauffer Chemical Company rather than the Phoenix Securities Company is shown not merely by this explanation given by Mr. Dittmar, but also by the answer thereto by Mr. Hatch. Says the latter (Tr. p. 118): "We regret that you feel constrained to volunteer the suggestions contained in your letter of the 20th to the Stauffer Company, because we assumed that you represented our interests as distinguished from theirs, and that no matter what degree of fairness you use in the matter, you can expect that you will be asked *as representing us* to concede more". Plaintiff in error may differ with Mr. Dittmar upon this point as a matter of professional ethics, but clearly the point has no legal significance in this case. It is fundamental that to defeat the right of a broker to his commission a breach of faith on his part towards his principal must amount in effect to fraud. In the New York case (*Sibbald v. Bethlehem Iron Company*, 83 N. Y. 378), quoted from by counsel, the broker went so far as to advise the prospective purchaser that he thought that a lower cash price than had been asked for

by the owner would be accepted and yet this conduct was not even discountenanced by the court.

The only point that remains for consideration is the contention of plaintiff in error that no count in respondent's complaint stated the facts precisely as they developed upon the trial.

Even if such variance occurred we submit that the objection cannot be urged at this time, particularly in the absence of special findings by the lower court. If the plaintiff in error was surprised by the evidence introduced by defendant in error, it could have asked for a continuance for the purpose of meeting the evidence actually offered. No such request however was made. No word of objection on the ground of variance appears in the record. Under these circumstances, the point raised is clearly untenable.

The rule in the state courts of California has been thus expressed:

“If, as is claimed, there was a variance between the averments and the proof offered, or that the evidence was not within the issues, defendants should have pointed it out then and there, so that if well taken, opportunity might have been given to amend the complaint.”

Stover v. Stephens, 16 Cal. App. Dec. 354, 355, citing *Knox v. Highby*, 76 Cal. 264; *Henry v. S. P. R. R. Co.*, 50 Cal. 176.

The Supreme Court of the United States has thus stated the rule:

"The objection of variance not taken at the trial, cannot avail the defendant as an error in the higher court, if it could have been obviated in the court below. * * * In the case before us the plaintiff was entitled to be apprised of the objection if it were intended to be relied upon, at an early period in the progress of the trial. The court would, doubtless, have permitted an amendment if deemed necessary, upon such terms as the interests of justice might seem to require."

Roberts v. Graham, 6 Wall. 578, 18 L. ed. p. 791.

To the same effect is the decision of the court in the case of *Preiss v. Zitt* (148 Fed. R. 617; C. C. A. 8th Circ.):

"It is well settled that objection to a variance between averment and proof must be taken when the evidence is offered, otherwise it will be deemed to have been waived. If the evidence is sufficient to support the verdict, and it was in this case, mere defects of averment in the pleadings are cured" (citing cases).

The purchaser for the lands in question having originally been procured by defendant in error and the sale of such lands having been actually consummated, though upon modified terms which were satisfactory to the vendor, the evidence of these facts was clearly sufficient to support the judgment and under the cases cited plaintiff in error is not now in a position to urge the objection, even if it were otherwise tenable, that the complaint does not precisely agree with the evidence offered at the trial.

In conclusion, we would call the court's attention to the language employed in the case of *Stewart v. Mather et al.*, 32 Wis. 344, as follows:

“The authorities cited show that wherever the sale is effected through the efforts of the broker or through information derived from him so that he may be said to be the procuring cause of it, his services are regarded as highly meritorious and beneficial *and the law leans to that construction which will best secure the payment of his commission rather than the contrary.*” (Italics ours.)

Dated, San Francisco,

March 15, 1915.

Respectfully submitted,

MORRISON, DUNNE & BROBECK,

Attorneys for Defendant in Error.

R. L. McWILLIAMS,

Of Counsel.

No. 12525

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

PHOENIX SECURITIES COMPANY

(a corporation),

Plaintiff in Error,

VS.

M. E. DITTMAR,

Defendant in Error.

**REPLY BRIEF FOR PLAINTIFF
IN ERROR.**

L. A. REDMAN,

Attorney for Plaintiff in Error.

Filed this.....day of March, 1915.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

No. 2525

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PHOENIX SECURITIES COMPANY

(a corporation),

Plaintiff in Error,

vs.

M. E. DITTMAR,

Defendant in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

Pursuant to permission given by the Court upon the oral argument of this cause, we submit the following reply to several points made in the brief of plaintiff, and not covered by the argument made in defendant's opening brief.

I.

Plaintiff contends that this Court can not "re-view the evidence" in the case because there was no "request" made at the close of the trial for judgment in favor of the defendant. But, in the first place, we insist that there was a "request" made

for judgment for defendant. It appears from the record (p. 156) that the case was "argued" on behalf of defendant. An "argument" necessarily involves a "request" for judgment. An "argument" is not only a "request", but a statement of the grounds of the "request" as well. It would be preposterous, we submit, to hold that if the case was submitted for decision with a simple "request" for judgment, this Court could "review the evidence", but that it cannot do so if the case was "argued", that is to say, if the necessarily implied "request" for judgment was fortified by the grounds and reasons therefor. The practice of "requesting" judgment where the case is tried without a jury has never prevailed in this Circuit, and we apprehend that any trial Judge here, to whom such a "request" was preferred would entertain it with a smile. And, of course, a ruling upon such "request" must necessarily be deferred, where as here a case is taken under advisement, until the case is decided. The Court would not by denying the "request" forestall its future decision. And furthermore we submit that what may be done indirectly may be done directly. A Court would stultify itself by holding that it had no jurisdiction to determine the purely legal question of the sufficiency of the evidence to support the judgment, but that it could do this very thing where the device was adopted of requesting judgment and excepting to the refusal of the Court to grant the request. This would savor of judicial trickery and it cannot be

assumed that such a thing was intended by the Act of Congress.

It is obvious that the real ground for review is not that judgment has been "requested" but because the question of the *sufficiency* of the evidence (not of its *weight*) presents a *pure question of law*.

The Public Utilities Act of this state provides that the findings of the Railroad Commission on questions of fact shall be final and not subject to review. But this provision was held by the Supreme Court in *Del Mar Water &c. Co. v. Eshleman et al.*, 167 Cal. 666 (677), not to preclude inquiry as to whether or not there was evidence to sustain the findings of the Commission, that question being "purely one of law".

In *Enman v. Dalziel & Co.*, Court of Sessions Cases (1911-12), May 4, 1912, p. 966, the Lord President said:

"Now, as your Lordships well know it has been conclusively settled by decisions of the House of Lords and of this court that although such appeals are by statute limited to questions of law, nevertheless they are competent when the question is whether such findings as these can be supported by the evidence submitted, for that has been held to be a question of law. The criterion is whether anyone could reasonably have come to that conclusion."

To the same effect see also

Condron v. Gavin Paul & Sons, Ltd., 41 Scot. Law Rep. 33, Court of Sessions Cases November 5, 1903;

Leishman v. William Dixon, Ltd., Court of Sessions (1909-10) February 10, 1910;
McCaffrey v. Great Northern Ry. Co., 36 Irish Law Times Reports 27;
United Collieries, Ltd. v. McGhie, Vol. VI Court of Sessions Cases (5th Series) 809-11;
Dailly v. John Watson, Ltd., Vol. II Court of Sessions Cases (5th Series) 1044-7;
O'Hara v. Cadzow Coal Co. Ltd., Vol. V Court of Sessions Cases (5th Series) 439-440, 443-444.

In *In re Buckley*, 105 N. E. 979, the Court said:

“There is no appeal from the finding of the Board upon a question of fact where there is any evidence to support it; but where as here the evidence is all reported the question whether it is sufficient to support the finding is one of law and may be revised here.”

In *International Harvester Co. v. Industrial Commission*, 147 N. W. 53, the Court said:

“The rule in certiorari cases is that if in any reasonable view of the evidence it will support the conclusion arrived at, such conclusion will not be disturbed for want of support in the evidence. If, however, the finding has no support in the testimony there was no jurisdiction to make it.”

The case of *Streeter v. Sanitary District of Chicago*, 133 Fed. 124, cited by plaintiff, is not in point because as appears from the opinion in that case, the

“request in our judgment goes to the weight or preponderance of evidence, not to the question

whether the evidence making for the plaintiff is adequate, unimpeached and without conflict. It demands a weighing of the evidence. It does not proceed upon the ground that there is a total lack of evidence to support a contrary finding”.

Nor is the case of *Blanchard v. Commercial Bank of Tacoma*, 75 Fed. 249 in this Circuit, cited by plaintiff, in point, because in that case also, as stated by the Court in its opinion, it was necessary to “weigh the evidence and determine the preponderance thereof”. Here the attack upon the judgment *does* “proceed upon the ground that there is a total lack of evidence to support a contrary finding”.

II.

But a determination of the question just discussed is not necessary to a disposition of the appeal herein because of the reservation of exceptions to the admissibility of the evidence relating to the alleged “reasonable value” of plaintiff’s services. If as we contend such evidence was inadmissible, that is to say that it was immaterial what the reasonable value of plaintiff’s services were, because upon the facts proved the defendant was not liable for such “reasonable value” then the judgment must be reversed *upon the exceptions taken to the rulings of the trial Court admitting such evidence*. Of course the determination of this question incidentally involves the consideration of the question of the sufficiency of the evidence, but even if the question of the suf-

iciency of the evidence cannot be reviewed by the Court as an independent proposition, it necessarily can be where as here it is involved in a ruling made by the lower Court "in the progress of the trial of the cause" and excepted to.

The statement made in plaintiff's brief (p. 4) that no particular grounds of objection to the testimony were specified, is incorrect. In each instance the grounds of objection were that the evidence "sought to be elicited was immaterial, irrelevant and incompetent, and that no proper foundation had been laid for it" (pp. 44, 49-50). And moreover the grounds of objection were elaborated in the argument upon the merits of the case, because as above stated, the objections to the admissibility of evidence as to the reasonable value of services went to the heart of the controversy, which was, whether or not plaintiff was entitled to recover upon a *quantum meruit*; and this question was briefed in the lower Court (p. 33). The rulings upon the evidence made at the trial were *pro forma* merely. If judgment went for defendant the error in admitting the evidence was cured. A judgment for plaintiff, however, after argument in opposition to the claim that plaintiff was entitled to recover upon a *quantum meruit* necessarily implies familiarity by the Court with the grounds of objection urged to the admissibility of testimony relating to the reasonable value of plaintiff's services. For these reasons we submit that there is no merit in the claim that the objections to the evidence were not sufficiently explicit.

None of the cases cited by plaintiff in his brief in support of his claim upon this proposition are in point. They were all cases where objections were made without any grounds therefor being given, and moreover were not objections going to the vital points in controversy.

III.

On pages 21 *et seq.* of his brief plaintiff contends that the objection that there was a variance between his pleadings and proof can not be raised in this Court because no such objection was made in the Court below. But the point urged by us in the Court below, as well as here, is not one of variance between the pleadings and the proof curable by amendment, but the point made is that the evidence does not justify a recovery by the plaintiff *upon any theory*. In other words our contention is that defendant is entitled to judgment *assuming that the facts proved had been pleaded*. The variance of which we complain is not a variance between a cause of action pleaded, and a cause of action proved, but it is a variance between a cause of action pleaded and proof which fails to establish the cause of action pleaded or any other cause of action.

Dated, San Francisco,

March 22, 1915.

Respectfully submitted,

L. A. REDMAN,

Attorney for Plaintiff in Error.

No. 2525

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PHOENIX SECURITIES COMPANY

(a corporation),

Plaintiff in Error,

vs.

M. E. DITTMAR,

Defendant in Error.

PETITION FOR A REHEARING ON BEHALF OF PLAINTIFF IN ERROR.

L. A. REDMAN,

Mills Building, San Francisco,

*Attorney for Plaintiff in Error
and Petitioner.*

Filed this..... day of August, 1915.

AUG 3 - 1915

FRANK D. MONCKTON, Clerk.

F. D. Monckton,

By..... Deputy Clerk.

No. 2525

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PHOENIX SECURITIES COMPANY

(a corporation),

Plaintiff in Error,

vs.

M. E. DITTMAR,

Defendant in Error.

PETITION FOR A REHEARING ON BEHALF OF PLAINTIFF IN ERROR.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Plaintiff in error (defendant below) respectfully asks for a rehearing in this case for the reasons and upon the grounds hereinafter set forth:

I.

THE TRIAL COURT ERRED IN OVERRULING DEFENDANT'S OBJECTIONS TO THE TESTIMONY OFFERED BY PLAINTIFF, IN SUPPORT OF HIS CLAIM THAT HE WAS ENTITLED TO RECOVER THE REASONABLE VALUE OF HIS SERVICES.

In the opinion filed herein the Court holds that plaintiff may recover the reasonable value of ser-

vices rendered as a broker if defendant accepted the benefit of such services, notwithstanding that under the terms of an express agreement between the parties, plaintiff was entitled to a commission only in case of a contingency which never occurred. We respectfully submit that this position is untenable and opposed to all of the authorities. The law upon the subject is thus stated in

Sibbald v. Bethlehem Iron Company, 83
N. Y. 378:

“The broker may devote his time and labor and expend his money with ever so much of devotion to the interests of his employer, and yet if he fails, if without effecting an agreement or accomplishing a bargain, he abandons the effort or his authority is fairly and in good faith terminated he gains no right to commissions. He loses the labor and effort which were staked upon success, and in such event it matters not that after his failure and the termination of his agency what he has done proves of use and benefit to the principal. In a multitude of cases that must necessarily result. He may have introduced to each other parties who otherwise would have never met. He may have created impressions which under later and more favorable circumstances naturally lead to and materially assist in the consummation of a sale. He may have planted the very seeds from which others reap the harvest; but all this gives him no claim. It was part of his risk that failing himself and not successful in fulfilling his obligation others might be left to some extent to avail themselves of the fruit of his labors.”

Speaking to the same subject, the Supreme Court of the State of California in *Brown v. Mason*, 155 Cal. 155 (160), said:

“It can not be reasonably said that he was working under an express written contract if he could succeed in fulfilling its terms and under an implied contract if he could not accomplish that desired result. He took the risks of his employment and was subject to the results of failure or success under the provisions of his contract of agency.”

To the same effect see also:

Payseno v. Swenson, 178 Fed. 999;

Rees et al. v. Spruance, 45 Ill. 308;

Ames v. Lamont, 83 N. W. 780;

McArthur v. Slauson, 9 Id. 784.

In the case at bar the plaintiff did not, acting as a broker or otherwise, find a purchaser for the property. The purchaser went to him upon the erroneous assumption that he was the agent of the owner of the property or interested as an owner therein. Instead of frankly informing the owner that inquiry had been made of him regarding a prospective purchase of the property, plaintiff kept the matter a secret and thereafter succeeded in effecting an arrangement with the seller whereby he could earn a large contingent commission of \$10,000 on the sale of the property in the event it went through on certain specified terms. No such sale was ever made. The purchaser *declined* to take the property upon the terms of the option which had been given to it

(p. 72), and then, and then only, was a new contract entered into whereby if the payments stipulated to be made therein are made the seller will receive \$19,000 less for the property than it would have received if the option had been taken up; and in addition to this, expenses amounting to about \$10,000 have been incurred by the seller in order to carry out the terms of the new contract.

Plaintiff contended in the trial Court that the sale which was finally effected would not have been made if he had not interested himself in bringing the parties together. But this is purely a matter of speculation unsustained by a particle of proof with the probabilities greatly against it. Had plaintiff, when he was approached by the purchaser, informed the purchaser of the situation and had he not, *purely in his own interest*, undertaken to arrange a sale, the purchaser would probably have taken the matter up directly with the owner. The fact is that the services rendered by the plaintiff were rendered wholly in his own behalf and were probably of no real value whatever to the defendant.

In support of his theory that he was entitled to recover the reasonable value of his services, plaintiff offered at the trial evidence as to the value of such services. Objection was made to the offer upon the ground that plaintiff was bound by the terms of his contract and that he must recover under it or not at all. Defendant's objections were overruled and exceptions reserved to the rulings of the Court

(pp. 44, 48-50). Of course if, as the authorities hold, plaintiff under the circumstances stated, is not entitled to recover except under the terms of his contract, the Court erred in admitting the evidence regarding the value of the services rendered and such error necessitated the reversal of the judgment. These rulings of the trial Court bring up for consideration the only questions involved on the appeal and it was therefore wholly immaterial whether or not defendant "requested" the Court to render judgment for defendant upon the trial. Had such a "request" been necessary and had it been made, denied and an exception reserved to the ruling, a discussion of the merits of the exception *would have but raised the same point that is raised by the exceptions to the admissibility of the evidence regarding the reasonable value of plaintiff's services.* This brings us to the consideration of the first point referred to in the opinion filed herein, namely, that defendant did not "request" the Court upon the trial to render judgment for defendant.

II.

PLAINTIFF IN ERROR DID REQUEST THE TRIAL COURT TO RENDER JUDGMENT FOR DEFENDANT AND WHETHER IT DID OR NOT IS WHOLLY IMMATERIAL IN VIEW OF THE EXCEPTIONS RESERVED AT THE TRIAL TO THE RULINGS OF THE COURT PERMITTING PLAINTIFF TO PROVE THE REASONABLE VALUE OF THE SERVICES RENDERED BY HIM.

In the opinion filed herein the Court holds that

the sufficiency of the evidence to sustain the judgment cannot be reviewed in the absence of a "request" made to the Court by the defendant at the trial that judgment be entered in favor of defendant and an exception reserved to a ruling denying the motion; and that the record fails to show that such "request" was made. The reference to this matter in the opinion of the Court seems to imply that some advantage was lost by not "requesting" the trial Court to render judgment in favor of defendant. That had defendant done so, it would be necessary for the Court to pass upon the question of the sufficiency of the evidence and that it was absolved from so doing by reason of the fact that such request was not made. As we have just pointed out, however, if it be true, as the Court holds, that plaintiff may recover the "reasonable value" of his services notwithstanding his contract and that therefore the Court did not err in admitting evidence upon the question of the value of such services, *it follows necessarily that the evidence was sufficient to justify the judgment* and that no advantage was lost by the fact that defendant did not request the trial Court to render judgment upon the evidence in its behalf. If upon the facts proved, testimony regarding the reasonable value of plaintiff's services was both *material and relevant*, it was only because plaintiff *was not limited to the terms of his agreement with defendant and might recover, notwithstanding that the contingency provided for in such agreement had not occurred*. In other words,

the question of the sufficiency of the evidence is *necessarily involved in the question of the correctness of the ruling of the trial Court admitting evidence respecting the reasonable value of plaintiff's services*. It follows of course that if the Court is right in sustaining the rulings of the trial Court respecting the admissibility of the evidence referred to, the judgment would have to be affirmed *even if a request for judgment had been made at the trial*. The Court necessarily holds *that the evidence was sufficient*, otherwise the evidence respecting the value of the services would be *immaterial and irrelevant*.

But we respectfully submit that the rule to which the Court refers in its opinion should not be held applicable to a case of this kind. The fact is, as shown by the record (p. 33), that the trial began before a jury, but that the jury was dismissed as soon as it became apparent that the evidence presented purely a legal question, namely, whether or not plaintiff could recover at all under the evidence *which was without conflict upon any material point*. After the jury was discharged and the balance of the evidence read to the Court from the depositions, his Honor, Judge Van Fleet who presided at the trial, stated that owing to other engagements, he would not be able to decide the case for a number of months and requested counsel to argue the case upon briefs, and it was so presented (p. 33). Of course, as the mind of the Court was not made up, it would have been wholly out of

place *and utterly useless* for defendant to “request” a decision then and there in favor of defendant, and if such a request had been made the Court would undoubtedly have declined to pass upon it. As the law *never requires a useless thing to be done* the “request” was necessarily excused. Furthermore if a “request” was necessary then a *ruling upon it was also necessary*. Would the Court in such case be required to make a ruling *before it heard the argument*? And if such a ruling was made it would, we must assume, be binding upon the Court and the parties though it might not be in harmony with the final views of the Court!

But assuming that a “request” was necessary we respectfully submit that the brief filed, as the record shows (p. 33), on behalf of defendant in the trial Court in a case such as this which involves *purely a legal question*, is necessarily a “request” for judgment. It is more than this; it is not only a “request” but it is a “request” coupled with a statement of the grounds of the request. It is true that the record shows no formal ruling by the Court upon such request for judgment by defendant but of course the order for judgment for plaintiff is a ruling and such order is deemed to be excepted to.

The rule to which the Court refers, requires in a case tried *before a jury*, in order that the sufficiency of the evidence may be reviewed on writ of

error, that the Court be requested to *instruct the jury* to return a verdict for the defendant. But the practice has never prevailed in cases tried before the Court of requesting the Court *to instruct itself* to decide the case in favor of defendant, and we respectfully submit that the ends of justice are not promoted by holding that any such formal request is necessary. Surely if, as is the fact, counsel for defendant filed with the Court a brief in which he argued that upon the undisputed testimony defendant was entitled to judgment, this is the only "request" that the law exacts or the Courts should hold to be necessary. The merits of a controversy should not, we submit, be allowed to turn upon a refinement between a formal "request" for judgment and a written argument in support of the contention that defendant is entitled to judgment. Such a distinction, if upheld, would tend, it seems to us, to promote the growing disrespect for the law which is now unfortunately so widespread. We most respectfully ask that the Court give this matter further consideration.



III.

It is said in the opinion filed herein that defendant did not at the trial urge that there was a variance between *the pleadings* and *the proof* and not having done so, that the point cannot be urged in this Court. But no such point was made in the briefs filed by plaintiff in error herein as an exam-

ination of them will disclose. The point that was urged both in this Court and in the Court below is not one of variance between the *pleadings* and the *proof* curable by amendment, but the point that was and is urged is that the *evidence does not justify a recovery by the plaintiff upon any theory*. In other words, our contention is that defendant was entitled to judgment *assuming that the facts proved had been pleaded*. As a reading of our briefs will demonstrate our entire argument was addressed to the proposition that the *facts proved* did not warrant a recovery *under any form of pleading whatever*.

Dated, San Francisco,

August 2, 1915.

Respectfully submitted,

L. A. REDMAN,

*Attorney for Plaintiff in Error
and Petitioner.*

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for plaintiff in error and petitioner in the above-entitled cause and that in my judgment the foregoing petition for a rehearing is well-founded in point of law as well as in fact and that said petition is not interposed for delay.

L. A. REDMAN,

*Attorney for Plaintiff in Error
and Petitioner.*

No. 2525

IN THE
United States Circuit Court of Appeals

For the Ninth Circuit

PHOENIX SECURITIES COMPANY
(a corporation),

Plaintiff in Error,

vs.

M. E. DITTMAR,

Defendant in Error.

ANSWER TO PETITION FOR A REHEARING.

MORRISON, DUNNE & BROBECK,
Attorneys for Defendant in Error.

R. L. McWILLIAMS,
Of Counsel.

Filed this.....*day of August, 1915.*

FRANK D. MONCKTON, Clerk.

By.....*Deputy Clerk.*

No. 2525

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PHOENIX SECURITIES COMPANY
(a corporation),

Plaintiff in Error,

VS.

M. E. DITTMAR,

Defendant in Error.

ANSWER TO PETITION FOR A REHEARING.

The first contention of plaintiff in error, that a recovery may not be had by defendant in error, even though a count *in quantum meruit* is contained in the complaint where a purchase is not consummated upon the original terms of the employment, is not only not in accordance with the great weight of authority, but is not even sustained by the New York case principally relied upon by counsel. That case (*Sibbald v. The Bethlehem Iron Company*, 83 N. Y. 378, 390) merely decided the point that

“If after a broker has been allowed a reasonable time within which to produce a buyer and effect a sale, he has failed to do so, and the seller in good faith and fairly has terminated

the agency and sought other assistance by the aid of which a sale is consummated, it does not give the original broker a right to commissions, because the purchaser is one whom he introduced and the final sale is in some degree aided or helped forward by his previous unsuccessful efforts."

In that case the broker who was suing had had his employment terminated in good faith.

In the case at bar the authority of the defendant in error had not been revoked, and the option contract which he procured was still alive and in force at the time of its modification by the parties thereto.

The distinction between the case of *Sibbald v. Bethlehem Iron Company* and the case at bar is recognized in the subsequent New York cases, as in the case of

Diamond v. Wheeler (80 N. Y. Suppl. 416), where the jury found that the employment of a broker had not been terminated; the case of

Buehler v. Weiffenbach (46 N. Y. Suppl. 861),

in which it was held that a broker was entitled to commission where, on behalf of a client, he made an offer for property which was rejected, and subsequently accepted when made through another broker; in the case of

Levy v. Coogan (9 N. Y. Suppl. 534), holding that where plaintiff introduced purchasers to the defendants, and negotiations were carried on by defendants' agent resulting in an agreement

for a slightly smaller sum than that originally proposed, the plaintiff might recover.

The further contention of plaintiff in error that the defendant in error did not find a purchaser for the property since the purchaser went to him of his own volition is squarely contrary to the decision of the case of

Lawler v. Armstrong (102 Pac. 775),
cited by us in our former brief.

Counsel for plaintiff in error next contend that:

“If the Court is right in sustaining the rulings of the trial Court respecting the admissibility of the evidence referred to, the judgment would have to be affirmed, even if a request for judgment had been made at the trial. The Court necessarily holds that the evidence was sufficient, otherwise the evidence respecting the value of the services would be immaterial and irrelevant” (page 7).

This by no means follows. Counsel loses sight of the difference between the admissibility of evidence and its cumulative effect upon the Court in enabling it to come to a decision upon the merits. The ruling of the Court that the evidence was *admissible* did not necessarily mean that the Court must find for the plaintiff. After reviewing all of the evidence along the line in question, the Court might, nevertheless, have found that its cumulative effect was not sufficient to permit of a recovery by the defendant in error.

The voluntary suggestion of counsel that the trial Court requested the parties to argue the case upon briefs, certainly cannot excuse the failure to comply with the rule prescribed by statute in order to enable this Court to review the errors complained of. Unquestionably if counsel had made the motion which the law requires him to have made, the Court would have ruled upon it one way or the other. If adversely to his contention, a subsequent examination of the briefs offered, might have induced the court to change its ruling.

The contention that the brief filed by plaintiff in error is necessarily a "request" for judgment, and that the order for judgment is a ruling, and that such order is deemed excepted to, has at least the merit of originality. We submit, however, that it will require more than the suggestion of counsel that the distinction made by the Court will promote "disrespect for the law", to induce the Court to ignore the plain requirements of the statute. The contention that the clear language of the statute in question (Rev. Stats., Sec. 700), that:

"The *rulings* of the Court *in the progress of the trial* of the cause, *if excepted to at the time*, and duly presented by a bill of exceptions, may be reviewed",

permits of any other conclusion than that reached by the Court, is clearly and hopelessly untenable.

A final argument that the objection to the questions asked by defendant in error was based, not

upon the ground of variance, but upon the ground that "the evidence does not justify a recovery by the plaintiff, upon any theory", is likewise without foundation. This argument, as stated in the brief of plaintiff in error, is based upon the theory that "the facts proved did not warrant a recovery under any form of pleading whatever". This contention, as we have seen and as was pointed out by this Court in its decision, is clearly contrary to well-settled law.

Dated, San Francisco,
August 9, 1915.

Respectfully submitted,

MORRISON, DUNNE & BROBECK,
Attorneys for Defendant in Error.

R. L. McWILLIAMS,
Of Counsel.

